INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	3
Statement:	
I. *McGautha:*	
A. The charges	3
B. The guilt trial	4
C. The penalty trial	4
D. Co-defendant's case on punishment	5
E. McGautha's case on punishment	7
F. Closing arguments	8
G. Jury instructions on punishment	9
H. Jury deliberations, verdict, and sentence	9
II. *Crampton:*	
A. The charge	10
B. The prosecution's evidence	11
C. The defense case	15
D. Jury instructions	17
E. Verdict and sentence	17
Summary of argument	18
Argument:	
I. The United States Constitution does not require that state legislatures prescribe statutory standards to guide or govern the jury's determination of sentence in a capital case	25

Argument—Continued Page

I. The United States Constitution—Continued

A. Historically, sentencing discretion, whether entrusted to judge or jury, in capital and non-capital cases, has not depended on legislative criteria:

1. Introduction: The attack on "standardless" sentencing in these cases implicates all felony sentencing 25

2. Jury sentencing discretion is firmly established in American criminal law:

(a) Jury-sentencing in non-capital cases 29

(b) Jury-sentencing in capital cases 32

B. Jury discretion in capital cases serves a legitimate governmental interest 48

C. Juries can and do function rationally without explicit legislative standards on capital sentencing 66

D. The present system of jury discretion in capital sentencing does not violate any constitutionally protected interest of an accused 78

II. Neither the privilege against self-incrimination nor the due process clause requires separate trials on the issues of guilt and punishment in every capital case 83

Argument—Continued Page
II. Neither the privilege—Continued
A. The unitary trial is the established and approved mode for even complex criminal cases... 84
B. A statute allowing the jury in a capital case to fix punishment as part of a single-stage guilt trial does not violate the privilege against self-incrimination.. 90
1. A defendant has no constitutional right to offer his personal testimony limited to the issue of punishment..... 91
2. The defendant in a unitary capital trial can present mitigation evidence through witnesses other than himself..... 99
3. The unitary trial procedure does not impermissibly burden the exercise of the privilege not to testify..... 102
C. A statute which authorizes the jury in a capital case to fix punishment in light of the evidence adduced at a one-stage trial on guilt is fundamentally fair..... 107
1. A state may rationally determine that a sentence for murder should be based on the circumstances of the crime itself..... 108

Argument—Continued
II. Neither the privilege—Continued
C. A statute which—Continued
2. Even at a murder trial confined solely to guilt, sufficient facts about the defendant emerge to permit intelligent sentencing 111
3. A separate hearing confined to penalty may affirmatively disadvantage defendants 114
Conclusion 125
Appendix A: Statutes involved 126
Appendix B: Initial introduction of jury discretion to set life sentence for murder and/or other capital offenses (none providing statutory standards) 128
Appendix C: States authorizing jury to exercise discretion in unitary trial to set sentence for murder at death or life imprisonment (none providing statutory standards) 132
Appendix D: States authorizing jury to exercise discretion in separate, post-guilt proceeding to set sentence for murder at death or life imprisonment (none providing statutory standards) 136
Appendix E: Federal civil statutes authorizing discretion in imposing capital punishment (none providing statutory standards) 138
Appendix F: Offenses under the Uniform Code of Military Justice punishable by death or such other punishment as a court martial may direct 140
Appendix G:
Model Penal Code § 210.6 141
Study Draft of a New Federal Criminal Code §§ 3602–3605 145

CITATIONS

Cases: Page

Anderson, In re, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968)---- 46
Andres v. *United States*, 333 U.S. 740 (1948)-- 38, 39, 41, 47
Andrews v. *Schwartz*, 156 U.S. 272 (1895)---- 80
Ashbrook v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935)---- 100
Bagley v. *State*, 247 Ark. 113, 444 S.W. 2d 567 (1969)---- 46
Baldwin v. *New York*, 399 U.S. 66 (1970)- 45, 63, 75
Bell v. *Patterson*, 279 F. Supp. 760 (D. Colo.), affirmed, 402 F. 2d 394 (C.A. 10, 1968)---- 29, 46, 85, 86, 87, 99
Betts v. *Brady*, 316 U.S. 455 (1942)---- 28
Brady v. *United States*, 397 U.S. 742 (1970)-- 102, 103
Brown v. *Walker*, 161 U.S. 591 (1896)---- 96
Brown v. *United States*, 356 U.S. 148 (1958)-- 98
Bruton v. *United States*, 391 U.S. 123 (1968)-- 67, 92
Calloway v. *United States*, 399 F. 2d 1006 (C.A.D.C.), certiorari denied, 393 U.S. 987 (1968)---- 33
Calton v. *Utah*, 130 U.S. 83 (1889)---- 38, 39
Carter v. *Jury Commission of Greene County*, 396 U.S. 320 (1970)---- 64
Coleman v. *Alabama*, 389 U.S. 22 (1967)---- 65
Coleman v. *United States*, 334 F. 2d 558 (C.A.D.C. 1964)---- 90
Coleman v. *United States*, 357 F. 2d 563 (C.A.D.C. 1965)---- 59
Commonwealth v. *Bell*, 417 Pa. 291, 208 A. 2d 465 (1965)---- 118
Commonwealth v. *Ross*, 413 Pa. 35, 195 A. 2d 81 (1963)---- 43
Contee v. *United States*, 410 F. 2d 249 (C.A.D.C. 1969)---- 85

Cases—Continued

Page

Cook v. *Willingham*, 400 F. 2d 885 (C.A. 10, 1965)---- 79
Crow Dog, Ex parte, 109 U.S. 556 (1883)---- 38
Duisen v. *State*,—Mo.—, 441 S.W. 2d 688 (1969)---- 47, 60
Duncan v. *Louisiana*, 391 U.S. 145 (1968)---- 63, 67
Ernst, Petition of, 294 F. 2d 556 (C.A. 3), certiorari denied, 368 U.S. 917 (1961)---- 46, 100
Ferguson v. *Georgia*, 365 U.S. 570 (1961)---- 93, 96, 100
Fitzgerald v. *Peyton*, 303 F. Supp. 467 (W.D. Va. 1969)---- 31
Florida ex rel. Thomas v. *Culver*, 253 F. 2d 507 (C.A. 5), certiorari denied, 358 U.S. 822 (1958)---- 46
Frady v. *United States*, 348 F. 2d 84 (C.A.D.C.), certiorari denied, 382 U.S. 909 (1965)---- 88, 90, 115, 123
Frank v. *United States*, 395 U.S. 147 (1969)---- 110
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966)---- 31
Gideon v. *Wainwright*, 372 U.S. 335 (1963)---- 28
Gohlston v. *State*, 143 Tenn. 126, 223 S.W. 839 (1920)---- 35
Gore v. *United States*, 357 U.S. 386 (1958)---- 80
Gregg v. *United States*, 394 U.S. 489 (1969)---- 79
Harrison v. *United States*, 392 U.S. 219 (1968)---- 99
Hill v. *United States*, 368 U.S. 424 (1962)---- 95
Holmes v. *United States*, 363 F. 2d 281 (C.A. D.C. 1966)---- 88
Howard v. *Fleming*, 191 U.S. 126 (1903)---- 82
Hunter v. *State*,—Tenn.—, 440 S.W. 2d 1 (1969)---- 47, 60
Jackman v. *Rosenbaum Co*, 260 U.S. 22 (1922)---- 44
Jackson v. *Denno*, 378 U.S. 368 (1964)---- 67
Jackson v. *State*, 225 Ga. 790, 171 S.E. 2d 501 (1969)---- 88

Cases—Continued

Page

Johnson v. *Commonwealth*, 208 Va. 481, 158 S.E. 2d 725 (1968), petition for certiorari dismissed pursuant to Rule 60, 396 U.S. 801 (1969) 47, 88
Johnson v. *United States*, 225 U.S. 405 (1912) 82
Jones v. *State*, 416 S.W. 2d 412 (Tex. Crim. App. 1967) 123
Kemmler, In re, 136 U.S. 436 (1890) 32
Louisiana ex rel. Francis v. *Resweber*, 329 U.S. 452 (1947) 32
McCants v. *State*, 282 Ala. 397, 211 So. 2d 877 (1968), pending on petition for certiorari, No. 5009 Misc., O.T. 1970 46
McKane v. *Durston*, 153 U.S. 684 (1894) 80
McMann v. *Richardson*, 397 U.S. 759 (1970) 102, 103
Manor v. *State*, 223 Ga. 594, 157 S.E. 2d 431 (1967) 61
Mathis v. *State*, 283 Ala. 308, 216 So. 2d 286 (1968) 88
Maxwell v. *Bishop*, 398 F. 2d 138 (C.A.8, 1968), vacated, 398 U.S. 262 (1970) 46, 87
Miller v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968) 46
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 45, 82, 108
O'Callahan v. *Parker*, 395 U.S. 258 (1969) 140
Parker v. *North Carolina*, 397 U.S. 790 (1970) 102
Parman v. *United States*, 399 F. 2d 559 (C.A. D.C.), certiorari denied, 393 U.S. 858 (1968) 85
People v. *Bandhauer*, 1 Cal. 3d 609, 83 Cal. Rptr. 184, 463 P. 2d 408 (1970) 61
People v. *Dusablon*, 16 N.Y. 2d 9, 261 N.Y.S. 2d 38, 209 N.E. 2d 90 (1965) 121

Cases—Continued

	Page
People v. *Fitzpatrick*, 308 N.Y.S. 2d 18 (Co. Ct. 1970)	47
People v. *Floyd*, 1 Cal. 3d 694, 83 Cal. Rptr. 608, 464 P. 2d 64 (1970)	118
People v. *Hicks*, 287 N.Y. 165, 38 N.E. 2d 482 (1941)	77
People v. *Hurst*, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969)	123
People v. *Kelley*, 44 Ill. 2d 315, 255 N.E. 2d 390 (1970)	123
People v. *McGautha*, 70 Cal. 2d 770, 76 Cal. Rptr. 434, 452 P. 2d 650 (1969), certiorari granted, 398 U.S. 936 (1970)	1
People ex rel. McKevitt v. *District Court*, —Colo.—, 447 P. 2d 205 (1968)	88, 95, 99
Pope v. *United States*, 372 F. 2d 710 (C.A. 8, 1967), vacated, 392 U.S. 651 (1968)	46, 88, 113
Pope v. *United States*, 392 U.S. 651 (1968)	138
Powell v. *Alabama*, 287 U.S. 45 (1932)	28
Powell v. *Texas*, 392 U.S. 514 (1968)	110
Raffel v. *United States*, 271 U.S. 494 (1926)	96
Reid v. *Covert*, 354 U.S. 1 (1957)	28
Schwab v. *Berggren*, 143 U.S. 442 (1892)	94
Scott v. *United States*, 419 F. 2d 264 (C.A.D.C. 1969)	48, 80
Segura v. *Patterson*, 402 F. 2d 249 (C.A. 10, 1968)	46, 62, 87, 95, 99, 106
Simmons v. *United States*, 390 U.S. 377 (1968)	98
Sims v. *Eyman*, 405 F. 2d 439 (C.A. 9, 1969)	46, 109, 111, 112, 116
Smith v. *State*, 437 S.W. 2d 835 (Tex. Crim. App. 1969)	122
Solesbee v. *Balkcom*, 339 U.S. 9 (1950)	29, 79
Specht v. *Patterson*, 386 U.S. 605 (1967)	79, 93, 94
Spencer v. *Texas*, 385 U.S. 554 (1967)	31, 38, 44, 67, 84, 86, 92, 98, 115, 116

Cases—Continued

Page

State v. *Crampton*, 18 Ohio St. 2d 182, 248 N.E. 2d 614 (1969), certiorari granted, 398 U.S. 936 (1970) ---------- 2, 100

State v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968), pending on petition for certiorari, No. 5011 Misc., O.T. 1970 -- 47, 69, 88, 115, 116

State v. *Johnson*, 34 N.J. 212, 168 A. 2d 1, appeal dismissed, 368 U.S. 145, certiorari denied, 368 U.S. 933 (1961) ---------- 29, 47

State v. *Kelbach*, 23 Utah 2d 231, 461 P. 2d 297 (1969) ---------- 47, 88, 95

State v. *Latham*, 190 Kan. 411, 375 P. 2d 788 (1962), certiorari denied, 373 U.S. 919 (1963) - 47

State v. *Maloney*, 105 Ariz. 348, 464 P. 2d 793 (1970) ---------- 81

State v. *Roseboro*, 276 N.C. 185, 171 S.E. 2d 886 (1970), pending on petition for certiorari No. 5178 Misc., O.T. 1970 ---------- 47, 61

State v. Smith, 74 Wash. 2d 744, 446 P. 2d 571 (1969), pending on petition for certiorari, No. 5034 Misc., O.T. 1970 ---- 47, 69, 123

State v. Walters, 145 Conn. 60, 138 A. 2d 786, appeal dismissed and certiorari denied, 358 U.S. 46 (1958) ---------- 46

State v. Worthy, 239 N.C. 449, 123 S.E. 2d 835 (1962) ---------- 61

Stephens v. Turner, 421 F.2d 290 (C.A. 10, 1970) ---------- 48, 82

Trop v. Dulles, 356 U.S. 86 (1958) ---------- 65

United States v. Chapman, 420 F. 2d 925 (C.A. 5, 1969) ---------- 79

United States v. Curry, 358 F. 2d 904 (C.A. 2), certiorari denied, 385 U.S. 873 (1966) - 87, 88, 115

United States v. Gross, 416 F. 2d 1205 (C.A. 8, 1969), certiorari denied, 397 U.S. 1013 (1970) ---------- 79

Cases—Continued

United States v. Huff, 409 F. 2d 1225 (C.A. 5), certiorari denied, 396 U.S. 857 (1969)..... 85, 86
United States v. Jackson, 390 U.S. 570 (1968).. 33, 87, 115, 117, 138
United States v. Kee Ming Hsu, 424 F. 2d 1286 (C.A. 2, 1970)..... 79
United States ex rel. Scoleri v. Banmiller, 310 F. 2d 720 (C.A. 3, 1962), certiorari denied, 374 U.S. 828 (1963)..... 88
United States ex rel. Smith v. Nelson, 275 F. Supp. 261 (N.D. Calif. 1967)..... 46
United States ex rel. Thompson v. *Price*, 258 F. 2d 918 (C.A. 3), certiorari denied, 358 U.S. 922 (1958)..... 87
United States v. *Trigg*, 392 F. 2d 860 (C.A. 7), certiorari denied, 391 U.S. 961 (1968)..... 79
United States v. *White*, 225 F. Supp. 514 (D.D.C. 1963)..... 115
Walz v. *Tax Commission*, 397 U.S. 664 (1970).. 43
Ward v. *California*, 269 F. 2d 906 (C.A. 9, 1959)..... 121
Washington v. *Texas*, 388 U.S. 14 (1967)..... 100
Weems v. *United States*, 217 U.S. 349 (1910).. 109
Wilkerson v. *Utah*, 99 U.S. 130 (1879)..... 32, 38
Williams v. *Florida*, 399 U.S. 78 (1970)..... 45, 63, 105
Williams v. *New York*, 337 U.S. 241 (1949).. 26, 28, 79, 93, 94, 109, 121
Williams v. *Oklahoma*, 358 U.S. 576 (1959)...27, 79, 93, 109
Williams v. *Oklahoma City*, 395 U.S. 458 (1969)..... 79
Wilson v. *State*, 225 So. 2d 321 (Fla. 1969)..... 46, 61
Winston v. *United States*, 172 U.S. 303 (1899).. 38, 39, 54, 61, 62
Witherspoon v. *Illinois*, 391 U.S. 510 (1968).. 32, 38, 64, 65, 66

Federal Statutes and Rules: Page

Act of January 15, 1897, c. 29, 29 Stat. 487 .. 129
Act of March 22, 1962, Pub. L. 87–423, 76 Stat. 46 131
Alaska Criminal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253 129
D.C. Code Ann. § 22–2404 (1967) 133
Fed. R. Civ. P. 42(b) 86
Fed. R. Crim. P. 14 ..... 86, 87
Fed. R. Crim. P. 32(a) 95
Uniform Code of Military Justice:
Art. 85, 10 U.S.C. § 885 140
Art. 90, 10 U.S.C. § 890 140
Art. 94, 10 U.S.C. § 894 140
Art. 99, 10 U.S.C. § 899 140
Art. 100, 10 U.S.C. § 900 140
Art. 101, 10 U.S.C. § 901 140
Art. 102, 10 U.S.C. § 902 140
Art. 104, 10 U.S.C. § 904 140
Art. 106, 10 U.S.C. § 906 140
Art. 110, 10 U.S.C. § 910 140
Art. 113, 10 U.S.C. § 913 140
Art. 118, 10 U.S.C. § 918 140
Art. 120, 10 U.S.C. § 920 140
18 U.S.C. § 34 139
18 U.S.C. § 794 139
18 U.S.C. § 837(b) 138
18 U.S.C. § 1111 139
18 U.S.C. § 1114 139
18 U.S.C. § 1201(a) 138
18 U.S.C. § 1716 139
18 U.S.C. § 1751 139
18 U.S.C. § 1992 139
18 U.S.C. § 2031 139
18 U.S.C. § 2113(e) 138
18 U.S.C. § 2381 139
21 U.S.C. § 176b 138

Federal Statutes and Rules—Continued
28 U.S.C. § 1257(3) 2
28 U.S.C. § 1291 80
42 U.S.C. § 2272 138
42 U.S.C. § 2274 138
42 U.S.C. § 2275 138
42 U.S.C. § 2276 138
49 U.S.C. § 1472(i) 139
State Statutes and Rules:
Ala. Code tit. 14, § 318 (1958) 132
Ala. Penal Code of 1841, Acts 1841, p. 122 ... 128
Alaska Stat. § 11.15.010 (Supp. 1968) 132
Alaska Stat. § 11.15.020 (Supp. 1968) 132
Ariz. Terr. Acts 1885, No. 70 129
Ariz. Rev. Stat. Ann. § 13–453 (1956) 132
Ark. Acts 1915, No. 187 130
Ark. Stat. § 41–2227 (1964) 132
Ark. Stat. § 43–2153 (1964) 132
Cal. Amendatory Acts 1873–1874, ch. 508 ... 37, 129
Cal. Penal Code § 190 (West, Supp. 1970) .. 2, 126, 136
Cal. Penal Code § 190.1 (West, Supp. 1970) .. 2, 4, 86, 118, 126, 136
Cal. Penal Code § 1026 86
Cal. Stat. 1957, ch. 1968, p. 3509 136
Colo. Laws 1901, ch. 64 129
Colo. Rev. Stat. § 40–2–3 (1963) 132
Conn. Gen. Stat. § 53–10 (1968) 136
Conn. Penal Code § 29 42
Conn. Penal Code, Pub. Acts 1969, No. 828 .. 119, 136
Conn. Pub. Acts 1951, No. 369 131
Conn. Pub. Acts 1963, No. 588 136
Dakota Terr. Laws 1883, ch. 9 129
Del. Code Ann. tit. 11, § 571 (Supp. 1968) ... 132
Del. Code Ann. tit. 11, § 3901 (Supp. 1968) .. 132
Del. Laws 1917, ch. 266 130
Fla. Acts 1872, No. 15, ch. 1877 129

State Statutes and Rules—Continued

Page

Fla. Stat. Ann. § 782.04 (1965) 133
Fla. Stat. Ann. § 919.23 (1944) 133
Ga. Acts 1866, No. 208 128
Ga. Acts 1866, No. 210 128
Ga. Code Ann. § 26–1101 (Supp. 1969) 136
Ga. Code Ann. § 26–3102 (Supp. 1969) 136
Ga. Code 1861, § 4220 128
Ga. Criminal Code, Laws 1968, p. 1249 136
Ga. Laws 1970, No. 1333 ..... 120, 136
Hawaii Laws 1955, Act 239 131
Hawaii Rev. Stat. § 748–4 (1968) 132
Ida. Code § 18–4004 (1948) 133
Ida. Gen. Laws 1911, ch. 68 130
Ill. Ann. Stat. ch. 38, § 1–7 (Smith-Hurd, Supp. 1970) 123, 133
Ill. Ann. Stat. ch. 38, § 9–1 (Smith-Hurd, 1964) 133
Ill. Criminal Code, Laws 1961, p. 1983 ..... 89, 133
Ill. Pub. Laws 1867, p. 90 128
Iowa Code Ann. § 690.2 (Supp. 1969) 132
Iowa Laws 1878, ch. 165 129
Ind. Ann. Stat. § 9–1819 (1956) 133
Ind. Ann. Stat. § 10–3401 (1956) 133
Ind. Rev. Stat. 1881, § 1904 129
Kan. Criminal Code, Laws 1969, ch. 180 133
Kan. Laws 1935, ch. 154 130
Kan. Stat. Ann. § 21–3401 (Supp. 1969) 133
Kan. Stat. Ann. § 21–4501 (Supp. 1969) 89, 133
Kan. Stat. Ann. § 21–4606 (Supp. 1969) 42
Kan. Stat. Ann. § 21–4607 (Supp. 1969) 42
Ky. Gen. Stat. 1873, ch. 29 129
Ky. Pub. Acts 1869, ch. 1659 128
Ky. Rev. Stat. § 435.010 (1969) 133
Ky. R. Crim. P. § 9.84 (1969) 133
La. Acts 1846, No. 139 128
La. Code Crim. P. Ann. art. 817 (West 1967) 133

State Statutes and Rules—Continued

La. Stat. Ann. § 14.30 (1951) 133
Me. Rev. Stat. Ann. tit. 17, § 2651 (1964) 132
Md. Ann. Code art. 27, § 413 (1967) 133
Md. Laws 1916, ch. 214 130
Mass. Acts 1951, ch. 203 131
Mass. Ann. Laws ch. 265, § 2 (1968) 133
Mich. Comp. Laws § 750.316 (Supp. 1970) 132
Minn. Gen. Laws 1868, ch. 88 128
Minn. Stat. Ann. § 609.185 (1964) 132
Miss. Code Ann. § 2217 (1956) 133
Miss. Code Ann. § 2536 (1956) 133
Miss. Laws 1872, ch. 76 129
Mo. Ann. Stat. § 546.410 (1953) 134
Mo. Ann. Stat. § 559.030 (1959) 134
Mo. Laws 1907, p. 235 130
Mont. Laws 1907, ch. 179 130
Mont. Rev. Codes § 94–2505 (1969) 134
Neb. Laws 1893, ch. 44 129
Neb. Laws 1969, ch. 213 ..... 42, 90, 134
Neb. Rev. Stat. § 28–401 134
Nev. Rev. Laws 1912, § 6386 130
Nev. Rev. Stat. § 200.030 (1969) 134
N.H. Laws 1903, ch. 114 129
N.H. Rev. Stat. Ann. § 585:4 (1955) 134
N.J. Pub. Laws 1916, ch. 270 130
N.J. Stat. § 2A: 113–4 (1951) 134
N.M. Laws 1939, ch. 49 130
N.M. Laws 1969, ch. 128 ..... 42, 90, 134
N.M. Stat. Ann. § 40A–2–1 (1964) 134
N.M. Stat. Ann. § 40A–29–2 (1964) 134
N.M. Stat. Ann. § 40A–29–2.1 (Supp. 1969) 134
N.Y. Laws 1937, ch. 67 130
N.Y. Laws 1963, ch. 994 136
N.Y. Penal Law § 65.00 (1967) 42
N.Y. Penal Law § 125.30 (1967) 136
N.Y. Penal Law § 125.35 (1967) 119, 136

State Statutes and Rules—Continued

	Page
N.C. Gen. Stat. § 14–17 (1969)	134
N.C. Sess. Laws 1949, ch. 299	130
N.D. Cent. Code § 12–06–06 (Supp. 1969)	132
N.D. Cent. Code § 12–27–13 (1960)	132
93 Ohio Laws 223 (1898)	37, 129
Ohio Rev. Code Ann. § 2901.01 (Page 1954)	2, 83, 127, 134
Ohio Rev. Code Ann. § 2947.05 (Page 1954)	95
Okla. Stat. Ann. tit. 21, § 707 (1958)	134
Okla. Terr. Stats. 1890, ch. 25	129
Ore. Gen. Laws 1920, ch. 19	130
Ore. Rev. Stat. § 163.010 (1967)	132
Pa. Laws 1794, ch. 257	34
Pa. Pub. Laws 1925, ch. 411	37, 130
Pa. Pub. Laws 1959, No. 594	136
Pa. Stat. tit. 18, § 4701 (1963)	118, 136
R.I. Gen. Laws § 11–23–2 (1969)	132
S.C. Acts 1878, No. 541	129
S.C. Acts 1894, No. 530	129
S.C. Code § 16–52 (1962)	134
S.D. Comp. Laws § 22–16–12 (1967)	134
S.D. Comp. Laws § 22–16–13 (1967)	134
S.D. Comp. Laws § 23–48–16 (1967)	134
Tenn. Code Ann. § 39–2405 (1956)	135
Tenn. Code Ann. § 39–2406 (1956)	135
Tenn. Laws 1837–1838, ch. 29	35, 128
Tex. Acts 1965, ch. 722	137
Tex. Code Crim. P. Ann. art. 37.07 (Supp. 1970)	119, 137
Tex. Gen. Laws 1858, ch. 121, art. 71a	128
Tex. Penal Code Ann. art. 1257 (1961)	137
Utah. Code Ann. § 76–30–4 (1953)	135
Utah Penal Code of 1876, Comp. Laws 1876, p. 586	129
Vt. Acts 1910, No. 225	130
Vt. Stat. Ann. tit. 13, § 2303 (Supp. 1969)	135

State Statutes and Rules—Continued
Page
Va. Acts 1914, ch. 240 130
Va. Code § 18.1-22 (1960) 135
Va. Code § 19.1-250 (1960) 135
Wash. Rev. Code § 9.48.030 (1956) 135
Wash. Sess. Laws 1909, ch. 249 130
Wash. Sess. Laws 1919, ch. 112 130
W. Va. Code 1870, ch. 159 128
W. Va. Code § 61-2-2 (1966) 132
Wis. Stat. Ann. § 940.01 (1958) 132
Wyo. Sess. Laws 1915, ch. 87 130
Wyo. Stat. § 6-54 (1957) 135
Foreign Statute:
Great Britain, Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, §§ 5, 6 54
Miscellaneous:
Appellate Power to Reduce Jury-Determined Sentences, 23 Rutgers L. Rev. 490 (1969) .. 61
Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1453 (1960) 28
American Bar Ass'n, Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures (Tent. Draft 1967) 28, 54
A.L.I., Model Penal Code (Tent. Draft No. 9, 1959) 34, 42, 57, 58, 61, 88
A.L.I., Model Penal Code (Proposed Official Draft 1962) 42, 56, 74, 75, 77, 88, 141
36 A.L.I., Proceedings (1959) 57, 58, 116
Bedau, The Death Penalty in America (rev. ed. 1967) 34, 49, 60, 61
Bifurcated Trial Procedure and First Degree Murder, 3 Suffolk U.L. Rev. 628 (1969) .. 117
Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania (1795) 34

Miscellaneous—Continued

Page

California and Pennsylvania Courts Divide on Question of Admissibility of Details of Prior Unrelated Offenses at Hearing on Sentencing Under Split Verdict Statutes, 110 U. Pa. L. Rev. 1036 (1962) 117

The California Penalty Trial, 52 Calif. L. Rev. 386 (1964) 118

The Capital Punishment Controversy, 60 J. Crim. L., Criminol. & Pol. Sci. 360 (1969) 66

The Changing Role of the Jury in the Nineteenth Century, 74 Yale L. J. 170 (1964) 30

Dawson, Sentencing: The Decision As to the Type, Length, and Conditions of Sentence (Am. Bar Foundation 1969) 27, 42, 58, 60

Executive Clemency in Capital Cases, 39 N.Y.U.L. Rev. 136 (1964) 117

Frankfurter, Of Law and Men (Elman ed. 1956) 69, 70, 112

George, *Aggravating Circumstances in American Substantive and Procedural Criminal Law*, 32 U.M.K.C.L. Rev. 14 (1964) 61

Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773 (1970) 68

Great Britain, Royal Commission on Capital Punishment 1949–1953, Report (1953) 53, 54, 70, 88

Great Britain, Select Committee on Capital Punishment, Report (1930) 34, 52

Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401 (1958) 111

Miscellaneous—Continued

Page

Jury Sentencing in Virginia, 53 Va. L. Rev. 968 (1967) 30, 31

Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904 (1962) 28

Kalven, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Preface*, 21 Stan. L. Rev. 1297 (1969) 74

Kalven & Zeisel, The American Jury (1966) .. 29, 59, 61, 68, 70, 71, 72, 77, 101, 120

Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099 (1953) 38, 100, 112, 115

Michael & Wechsler, Criminal Law and Its Administration (1940) 59

National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (1970) 42, 56, 58, 80, 88, 107, 145

Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964) 110

Poe, *Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions*, 37 G.W.L. Rev. 719 (1969) 33

Powers, Parole Eligibility of Prisoners Serving a Life Sentence (Mass. Correctional Ass'n 1969) 32

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) 30, 80

President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) .. 28, 32

Miscellaneous—Continued Page

Schwartz, *Punishment of Murder in Pennsylvania*, in II Royal Comm'n on Capital Punishment, Memoranda and Replies to a Questionnaire 776 (1952)---- 37

Sentencing Disparity: Causes and Cures, 60 J. Crim. L., Criminol., & Pol. Sci. 182 (1969)- 27, 42

Stephen History of the Criminal Law of England (1883)---- 52

A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing, 21 Stan. L. Rev. 1302 (1969)-- 51, 73, 77, 117

The Supreme Court and Capital Punishment—From Wilkerson to Witherspoon and Beyond, 14 St. L. U. L. Rev. 463 (1970)---- 62

Time Magazine, May 25, 1970---- 59

The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50 (1964)---- 58, 118

U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930–1968 (August 1969)---- 138, 140

Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425 (1968)---- 52

Wechsler, *Degrees of Murder and Related Aspects of the Penal Law in the United States*, in II Royal Comm'n on Capital Punishment, Memoranda and Replies to a Questionnaire 783 (1952)---- 56

Wechsler, *Symposium on Capital Punishment*, 7 N.Y.L.F. 250 (1961)---- 51

Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405 (1968)---- 28, 80

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 203

DENNIS COUNCLE MCGAUTHA, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 204

JAMES EDWARD CRAMPTON, PETITIONER

v.

STATE OF OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of California in *People* v. *McGautha* (Mc.A. 249–265) [1] is reported at 70 Cal. 2d 770, 76 Cal. Rptr. 434, 452 P. 2d 650.

[1] References to the printed appendices in the *McGautha* case and in the *Crampton* case are abbreviated herein as "Mc.A." and "C.A.", respectively. References to the transcript of record in the *Crampton* case will be given as "R.".

The opinion of the Supreme Court of Ohio in *State v. Crampton* (C.A. 83–88) is reported at 18 Ohio St. 2d 182, 248 N.E. 2d 614.

JURISDICTION

The judgment of the Supreme Court of California in *McGautha* was filed on April 14, 1969, and rehearing was denied on May 14, 1969 (Mc.A. 266). On June 21, 1969, the petition for a writ of certiorari was filed. Certiorari was granted, 398 U.S. 936, on June 1, 1970 (Mc.A. 267), limited to Question 1 of the petition.

The judgment of the Supreme Court of Ohio in *Crampton* was filed on June 11, 1969 (C.A. 82), and the petition for a writ of certiorari was filed on July 31, 1969. Certiorari was granted, 398 U.S. 936, on June 1, 1970 (C.A. 89), limited to Questions 2 and 3 of the petition.

This Court's jurisdiction rests in both cases on 28 U.S.C. 1257(3).

By order of June 29, 1970, the Court invited the Solicitor General to submit a brief expressing the views of the United States in these two cases. 399 U.S. 924. This brief is submitted in response to that order.

STATUTES INVOLVED

Sections 190 and 190.1 of the California Penal Code and Section 2901.01 of the Ohio Revised Code are set forth in Appendix A, *infra*, pp. 126–127.

QUESTIONS PRESENTED

In both cases:

1. Whether the principles of due process and equal protection require that a State which provides for a jury to determine if a death sentence should be imposed after conviction for first degree murder in a particular case must prescribe statutory standards to guide or govern that sentencing decision.

In *Crampton* only:

2. Whether a defendant's privilege against self-incrimination is violated by trying him under a statute that authorizes the jury, as part of a single proceeding, to find the defendant guilty of first degree murder and also to limit his punishment, after such a finding, to life imprisonment in place of the death penalty.

STATEMENT

I. MC GAUTHA

A. THE CHARGES

By information filed on April 6, 1967, petitioner Dennis Councle McGautha and co-defendants William Rodney Wilkinson and Fannie Lue Smith were charged with the armed robbery of one Pon Lock on February 14, 1967, and with the armed robbery and murder of Benjamin Smetana on the same date (Mc.A. 1–3). Petitioner McGautha was also charged with four prior felony convictions: felonious theft, robbery, murder without malice, and robbery by as-

sault (Mc.A. 3–4).[2] McGautha and his co-defendant Wilkinson went to trial on the information, after Miss Smith's case was severed (Mc.A. 6, 34–35).

B. THE GUILT TRIAL

The evidence established that at about 2:30 p.m. on February 14, 1967, McGautha and Wilkinson entered a market in Los Angeles and, brandishing pistols, kept one customer at bay while taking almost $300 from the owner, Mrs. Pon Lock.

At approximately 5:30 that same afternoon, McGautha and Wilkinson entered another market in Los Angeles, operated by Mr. and Mrs. Benjamin Smetana, again intent on armed robbery. While a customer was forcibly restrained by one of the robbers, the other one struck Mrs. Smetana on the side of her head and she fell to the floor. A shot was fired, and Mr. Smetana fell mortally wounded. The driver of the get-away car testified that McGautha admitted shooting the shopkeeper (Mc.A. 250–251).

The jury found both McGautha and Wilkinson guilty as charged of two counts of armed robbery and one count of first degree murder (Mc.A. 11–14).

C. THE PENALTY TRIAL

On the following day, a separate proceeding was commenced before the same jury, pursuant to Section 190.1 of the California Penal Code, to enable the jury

[2] In accordance with California practice, McGautha admitted these four prior convictions in a proceeding in chambers so that the fact of the convictions would not come before the jury at the guilt trial (Mc.A. 35–37).

to consider evidence on whether to fix life imprisonment or death as the sentence on the murder convictions (Mc.A. 15).

The State's case at the penalty phase was limited to the introduction of a file of documents from Texas containing records of petitioner McGautha's prior felony convictions, photographs, and fingerprints (Mc.A. 81).

D. CO-DEFENDANT'S CASE ON PUNISHMENT

Co-defendant Wilkinson then took the stand. He testified that at the time of the trial he was twenty-six years old, born in Mississippi the son of a white father and a Negro mother. He had attended a Negro school where his classmates teased him about his background. After his father died Wilkinson had to leave school in the 11th grade in order to help support his mother, his sisters, and his younger brother (Mc.A. 84–85). At age 18 he enlisted in the Army, and served without disciplinary action. He was honorably discharged after approximately six months of service when his I.Q., somewhere in the eighties, failed to meet revised Army standards (Mc.A. 85–86).

Wilkinson further testified that after returning home to Mississippi, and while he was working to support his family, a girl friend implicated him in a bad-check episode, but he was not convicted of any crime (Mc.A. 87). After that he went to California, where he took a job and rented a room in a boarding house run by a Baptist minister. He joined the minister's church and continued his attendance until he

was arrested for the robberies and murder (Mc.A. 87–88).

He had worked steadily for a time, earning promotions and sending support to his family in Mississippi (Mc.A. 88). All this had changed when in July 1965 he was shot in the back in an unprovoked assault by a street gang. After his hospital confinement, Wilkinson encountered difficulty getting or keeping a job, and it became necessary for his mother to send him money. It was during this period when he was "desperate for money" that Wilkinson met petitioner McGautha and his associates and the subject of hold-ups was broached to him (Mc.A. 91–92). Armed with a broken pistol he had found and never fired, Wilkinson testified, he had participated in the two robberies, but denied actually knowing that the stores were to be held-up until McGautha drew his gun at each store. Wilkinson denied that he had drawn his own pistol on either occasion (Mc.A. 95–100).

Wilkinson testified that it was McGautha, not he, who had fired the fatal shot, and that it was McGautha who had struck Mrs. Smetana (Mc.A. 109, 112, 114, 119).

Wilkinson called five other witnesses on his behalf: An undercover narcotics agent testified that he had seen the murder weapon in McGautha's possession; he had seen it kept under McGautha's pillow on one occasion, and on another occasion witnessed McGautha demonstrating his speed in drawing the gun from his waistband, where he carried it (Mc.A. 137–138). Wilkinson's girl friend testified that they at-

tended church services together (Mc.A. 142). The Baptist minister in whose boarding house Wilkinson had lived testified that Wilkinson attended his church and had a good reputation in the community. He also stated that when he visited Wilkinson in jail prior to trial, Wilkinson said he was horrified at what had happened and asked the minister to pray for him (Mc.A. 145–147). A police sergeant who had investigated the crime testified that Wilkinson had been cooperative following his arrest (Mc.A. 151). A former fellow employee who had also been Wilkinson's business partner in a salvage project described Wilkinson as an honest, non-violent person who had a good reputation (Mc.A. 157).

E. MC GAUTHA'S CASE ON PUNISHMENT

Petitioner McGautha too testified in his own behalf. Forty-one years old at the time of the trial, he admitted to having a "bad" criminal record but denied that he had shot Mr. Smetana or struck his wife (Mc.A. 159–160). Although he acknowledged that the murder weapon was his, he testified that between the two robberies Wilkinson had expressed concern that his own automatic could hold only one shell and that for this reason the two men had traded guns. Thus, McGautha testified, it was Wilkinson who had actually used the pistol to club Mrs. Smetana and to kill her husband (Mc.A. 160–161).

McGautha also testified that his mother and father had separated when he was four, that he had been injured in combat in 1942, that he had worked for

various celebrities, that he had a heart condition, and that he "regretted" Mr. Smetana's death (Mc.A. 162–164).

McGautha admitted his prior criminal record but denied committing two of the robberies for which he had been convicted and claimed that the murder-without-malice conviction involved only self-defense (Mc.A. 174–175). McGautha also admitted a guilty plea in 1964 to a charge of carrying a concealed weapon (Mc.A. 177).

Asked why he had lied to the police during their investigation of the crime, McGautha explained; "Normally, anyone would have done that, sir." (Mc.A. 180).

McGautha called no other witnesses. Both defendants then rested.

F. CLOSING ARGUMENTS

In closing arguments, the prosecutor stated to the jury: "Seriously consider whether or not the death penalty should be imposed on both defendants and as to the person who was Benjamin Smetana's killer fix the penalty at death." (Mc.A. 206). It was Wilkinson, the prosecutor argued, who struck Mrs. Smetana with his own gun, but petitioner McGautha who, using his pistol, shot Mr. Smetana (Mc.A. 202). Mention was also made of McGautha's prior felony convictions, including an earlier criminal homicide, and of his refusal to acknowledge his responsibility for those past crimes (Mc.A. 204–205).

Wilkinson's counsel emphasized his client's youth, his prior unblemished record, his low I.Q., his candor, and his remorse (Mc.A. 207–211). Petitioner Mc-

Gautha's counsel conceded that his client had a bad record and that he had told some lies, but asked the jury to set a life sentence because it was not McGautha who had pulled the trigger (Mc.A. 213, 218–219).

G. JURY INSTRUCTIONS ON PUNISHMENT

In instructing the jury on its responsibility to fix the penalty, the court advised them that while the law forbade them to consider mere conjecture, prejudice, or public feeling, they were free to be governed by "mere sentiment and sympathy" (Mc.A. 222). They were told that they might also consider "all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court" (Mc.A. 222). But the jurors were also told that they were entirely free to set the punishment notwithstanding any facts proved in aggravation or mitigation (Mc.A. 222–223). They were further instructed that "the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury" (Mc.A. 223).

H. JURY DELIBERATIONS, VERDICT, AND SENTENCE

During their deliberations on the penalty question, the jury returned to the courtroom several times to request further instructions and re-readings of testimony. They had Mrs. Smetana's testimony re-read, and asked for that portion of the testimony of the

driver of the get-away car that discussed what each of the defendants had in his hands when leaving the Smetana market (Mc.A. 225–226).[3] After another re-reading of a portion of Mrs. Smetana's testimony was requested and allowed (Mc.A. 229–230), the jury once again interrupted its deliberations to ask for a re-reading of the entire testimony of two other witnesses, and this was done (Mc.A. 231). After further deliberations, the jurors returned with a verdict fixing Wilkinson's penalty at life imprisonment and petitioner McGautha's sentence at death (Mc.A. 231–232).[4]

On September 15, 1967, Wilkinson was accordingly sentenced to life imprisonment upon his murder conviction (Mc.A. 31, 235–237). Petitioner McGautha's sentencing was postponed until September 29, 1967, to permit the Probation Department to prepare a probation report. (Mc.A. 237). On that date, the court denied McGautha's motion for a new trial or for a modification of the penalty verdict, and sentenced him to death (Mc.A. 32–33, 239–248).

II. CRAMPTON

A. THE CHARGE

Petitioner James Edward Crampton was indicted by a grand jury in Lucas County, Ohio, on March 2, 1967, and charged with murdering Wilma Jean

[3] Because of difficulty locating the portions desired, the witness's entire testimony was re-read to the jury (Mc.A. 228–229).

[4] Deliberations on the penalty question had begun at 2:12 p.m. on August 24, 1967, and the verdicts were returned at 4:45 p.m. on August 25, 1967 (Mc.A. 224, 231).

Crampton, purposely and with premeditated malice, on January 17th of that year (C.A. 4).

He pleaded not guilty to the charge and alternatively pleaded not guilty by reason of insanity (C.A. 4). He was then committed to Lima State Hospital for one month's observation, and when the hospital subsequently reported that Crampton would be considered sane he was ordered to stand trial (C.A. 1).

B. THE PROSECUTION'S EVIDENCE

The State's evidence established the following facts: Petitioner Crampton had married the deceased approximately four months prior to her death (R. 45; C.A. 57). The deceased's brother testified that about two months before the killing, Crampton had been allowed to leave the state hospital where he was undergoing observation to attend the funeral of his wife's father. After the funeral, the witness said he discovered Mrs. Crampton crying because her husband had taken a knife and run away. In the interim, Crampton had telephoned the house, and when his wife warned him to return to the hospital he told her "If you call the police, I will kill you then get to your mother" (R. 23–24, 35). Later that evening, after Mrs. Crampton and the witness notified the police, Crampton was picked up by the authorities (R. 37–38).

A friend of the victim testified that she was at the victim's home four days prior to the killing, when Crampton arrived and kicked and pounded on the back door until he was admitted (R. 41–42). Cramp-

ton then pushed his wife into the living room, and upstairs. He had a knife in one hand and was holding his wife at the same time. He said if anyone called the police he would kill them all (R. 42–43, 50). Later that evening he telephoned and told the witness to leave. The witness said she would but would take Mrs. Crampton with her. At that Crampton said he would come back to get them all with a gun he had (R. 43). Later witnesses confirmed that Crampton had made threats on his wife's life and that police protection had been ordered about ten days before the murder because of Wilma Jean Crampton's fear of her husband (R. 174, 212, 215).

In the course of the testimony of one of the State's witnesses it was brought out that he had first met Crampton in 1964 while they were both "doing time" in the Michigan State Prison (R. 58); that he had met Crampton again on January 14, 1967, in Pontiac, Michigan; that Crampton purchased some amphetamines (R. 61); that Crampton talked of his activities since his release from the Leavenworth Penitentiary, including his admission to a hospital for drug addiction (R. 61); that on the evening of January 14 he and the defendant drove to Gary, Indiana, where Crampton stole some license plates and put them on his rented car (R. 62); that they checked into a motel where they pilfered some money from the coin box of a mechanical vibrator (R. 63); that Crampton found his wife's car and towed it away (R. 62–63); that Crampton burglarized some coin machines and stole a typewriter at a truck stop (R. 65); that on

the evening of January 15, Crampton broke into a hospital to get some drugs, and stole some shaving equipment and a jacket as well (R. 68–69); and that Crampton then forged another prescription for amphetamines and obtained the drugs from a pharmacy, unsuccessfully trying the same technique to secure a different drug for his traveling companion, the witness (R. 71). After injecting drugs directly into his vein and after obtaining some more pills at another drug store, Crampton telephoned his wife in Toledo, and after the call announced that he and the witness had to drive there right away (R. 72–73, 108–109).

Crampton and his friend arrived in Toledo in the early morning hours of January 17 (R. 73). After first stopping at his wife's house, Crampton and the witness drove to the home of Crampton's mother-in-law; they broke in and stole several items including a rifle, some ammunition, and a few handguns—including one later identified as the murder weapon (R. 76–78). Crampton kept that pistol, a .45 caliber automatic, with him from then on (R. 79–80). Crampton then indicated that he suspected that his wife and her ex-boss were having an illicit affair, and Crampton and the witness drove around to several locations, in a car Crampton had just stolen, trying to find the couple (R. 78–82). As he was driving with one hand, Crampton fired the automatic out the car window, commenting that a slug like that could do quite a bit of damage, and adding "If I find them together I'm going to kill both of them" (R. 80).

405-388—70——3

Later, Crampton located his wife at home by telephone, and quickly drove out to the home. He told the witness: "Leave me off right here in front of the house and you take the car and go back to the parking lot and if I'm not there by six o'clock in the morning you're on your own" (R. 82).

On the following morning the police were summoned to Mrs. Crampton's home by her daughter, the child of a previous marriage, when the daughter was unable to rouse anyone at the house (R. 129–130). The investigating officer found Mrs. Crampton's dead body in an upstairs bathroom. She had been shot in the face at close range underneath her right eye. A .45 caliber shell casing was found beside the body. (R. 132–133, 167–168, 221–222, 230–231). The jacket Crampton had stolen during the hospital burglary a few days earlier was found in the living room (R. 69, 79, 204–205, 223, 229).

In the interim, before discovery of his wife's body, Crampton had been arrested for driving a stolen car. Between the bucket seats in the car Crampton was driving was the murder weapon, a .45 caliber automatic pistol (R. 139–141).

After being advised of his constitutional rights, Crampton admitted stealing the car and the .45 caliber pistol, and told about the other crimes he had committed over the past few days; he declined, however, to discuss his wife (R. 164–166, 170, 180–181, 224–228). A tape recording of one questioning session, containing these admissions and a reference to several years Crampton had spent in prison, was played before the jury (R. 252–266).

C. THE DEFENSE CASE

As part of the defense case, Crampton's mother was called as a witness. She stated he was born in 1926, making him 41 years old at the time of the trial (C.A. 49). At age nine she said Crampton had fallen off an ice truck and injured his head (C.A. 53). He was raised in a broken home until he left at age 14 because his stepfather did not want him around (C.A. 49). He reportedly was a good student but attended only one year of regular high school (C.A. 50–51). Later, after a dishonorable discharge from the Navy, he completed his high school education in the Jackson Prison while serving part of a 10–15 year sentence for robbery (A. 52). He also spent time in Leavenworth, his mother testified, for interstate transportation of a stolen car (C.A. 56). He was also known by his mother to have been a drug addict since at least 1949 (C.A. 55, 59).

During this period, he had married, had a child, been divorced, remarried to the same woman, and again divorced (C.A. 54–56). He married Wilma Jean Crampton in September 1966, approximately four months before she was murdered (C.A. 57).

In support of his insanity defense, Crampton introduced a series of hospital studies and reports, together with reports collected by hospital personnel from various state correction authorities. These documents contained a substantial amount of information about his background. For instance, it appeared that Crampton's intelligence was in the average to above-average range measuring from 106 to 113 on

various tests (C.A. 24, 40). The documents also showed that Crampton had a juvenile record, plus convictions for grand larceny, armed robbery, and interstate auto theft. He was a parole violator and had previously escaped from jail. While in the Navy he was court-martialed for larceny and impersonating an officer, and given an undesirable discharge. After then fraudulently enlisting in the Army, he was again court-martialed and dishonorably discharged. He had a long arrest record and was addicted to narcotics and amphetamines. Because of his frequent incarceration, he had no significant employment record (C.A. 14–15, 21–23, 26–27, 30, 32–33, 42, 46).

One report, based on information given by Crampton's wife when he was admitted to a state hospital for observation about two months prior to her murder, recorded that Crampton had struck her and threatened her with a knife (C.A. 9).

One of the reports prepared after Crampton was committed for observation following his insanity plea recited that he had suspected his wife of infidelity (C.A. 21). Various reports spoke of Crampton's claim that the shooting was accidental; that his wife had talked about shooting herself if Crampton did not return to the hospital; that he was gathering up the guns around the house and had just removed the clip from one gun when his wife, who was sitting on the toilet, asked to see it; and that in handing the gun

to her, it somehow discharged, wounding her fatally in the head (C.A. 21–24).[5]

All reports concluded that Crampton was sane, with no psychosis, organic brain damage, detachment from reality, or inability to distinguish right from wrong. His condition was characterized simply as an anti-social or sociopathic reaction, coupled with alcohol and drug addiction (C.A. 18, 20, 24, 25, 31).

D. JURY INSTRUCTIONS

After instructing the jury on the elements of first degree murder, possible lesser included offenses, and the defense of insanity (C.A. 60–70), the court told the jury of its punishment responsibility:

> If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life (C.A. 70).

E. VERDICT AND SENTENCE

The jury retired to deliberate at 2:00 p.m. on October 30, 1967, and at 6:15 p.m. they returned with a verdict of guilty of murder in the first degree, with no recommendation of mercy (C.A. 2, 78).

Sentence was imposed on November 15, 1967. Crampton was given the opportunity to state any

[5] In its instructions, the court charged the jury that there was some evidence that the killing was accidental, and that acceptance of such evidence would require a verdict of not guilty (C.A. 68).

reasons why sentence should not be imposed. He made certain statements that were found insufficient to prohibit the passing of sentence. He was accordingly sentenced to death, as required by the Ohio statute in the absence of a jury recommendation of mercy (C.A. 2–3, 78–79).

SUMMARY OF ARGUMENT

In the view of the United States, there is no constitutional impediment to affirmance of the convictions in both of these cases.

I

A. The common attack made both by McGautha and by Crampton is that the absence of statutory standards or criteria to govern or guide the jury's determinaton of punishment invalidates the death sentences imposed upon them. The argument that the Constitution requires legislative formulation of sentencing standards for jury sentencing in capital cases equally calls into question the settled practice of authorizing judges to set sentences in the exercise of broad discretion in non-capital felony cases without providing extrinsic standards. Such a thrust runs counter not only to the modern philosophy of maximizing sentence flexibility but also to this Court's pronouncements that sentencing procedures are not governed by the same rigid requirements that are constitutionally necessary for trying a defendant's guilt.

Jury sentencing in non-capital cases originated in colonial times and survives today in one-quarter of

the States. The authority for the jury in a capital case to determine whether the death penalty should be imposed upon conviction dates from at least 1838 and was well established by the time the Fourteenth Amendment was ratified. Virtually every American jurisdiction at some point or other has conferred discretionary power on the jury in a capital murder case to determine the penalty, and this practice is followed today wherever the death penalty for murder is retained. In the entire history of this universally accepted feature of our criminal laws no State, even when adopting other major alterations to its criminal code, has found it necessary or desirable to codify the considerations which should govern the jury's conscientious sense of judgment on this question. For at least a century this Court and lower federal and state courts have reviewed convictions and death sentences set by juries under these statutes and neither this Court nor any other has heretofore expressed anything but approval for the wisdom and fairness of entrusting flexible sentencing discretion to the trial juries in capital cases. This unbroken chain of legislative and judicial approval of "standardless" jury discretion in capital cases presents a powerful presumption that the practice is fundamentally fair within the meaning of the Due Process Clause.

B. Allowing a capital jury freedom to exercise its judgment on the question of the proper sentence in a particular case serves a legitimate public interest. There is first of all a variety of sound objections to any different approach. An attempt to codify "stand-

ards" that would be exclusive and exhaustive in the same sense as the elements of a crime would foolishly reintroduce the rigidity of long discredited automatic sentences; it is just not reasonably possible to define in advance exactly how a particular crime committed by a particular defendant should be punished. Some sentencing discretion is therefore essential. Proposals like that of the Model Penal Code to formulate a list of illustrative considerations that the sentencer in an actual case might treat as tending to aggravate or to mitigate the punishment suffer from other objections. There is considerable doubt that such criteria alert the modern jury to any pertinent considerations that would not be self-evident in the context of a concrete case. But in addition, respectable authority supports the fear that formal statutory enumeration of factors considered by the State to be "aggravating" may upset the current demonstrable reluctance of jurors to set a death sentence when they are charged with the intensely personal responsibility for determining the penalty. Moreover, statutory enumeration of abstract criteria could interfere with the legitimate State policy of leaving the life-and-death decision on penalty to the contemporary conscience of the community speaking through the jury.

C. Arguments that the Constitution requires statutory standards to circumscribe the jury's sentencing discretion proceed on erroneous legal and factual premises. This Court has repeatedly emphasized that an essential basis for our national commitment to trial by jury is the assumption that juries act fairly, ra-

tionally, and intelligently. Any contrary speculation in this type of case must assume that twelve jurors screened by defense counsel will conclude their deliberations with agreement that a man should die in the absence of any weighty reason or by virtue of some vicious bias. The empirical data demonstrate quite the opposite conclusion: that under the present system juries do act reasonably on the basis of pertinent considerations and that in so deciding they do *not* rely on any irrational factor or on any personal bias. Thus, whatever favorable reasons there may be for enacting formal lists of sentencing criteria, they cannot be said to be essential to just and rational sentencing by the modern American jury—a jury that must be chosen so as to insure that it will fairly represent the community.

D. The current practice of "standardless" jury sentencing does not violate any specific constitutional rights of an accused. It is well settled that a defendant cannot insist on "notice" of the considerations that may enter into his post-conviction sentencing and cannot demand an opportunity to litigate sentencing factors. Statutory criteria cannot be said to be essential to permit meaningful review since the Constitution does not assure the right to appeal, and particularly does not guarantee review of a sentence otherwise within prescribed limits. In the few States where sentence review is authorized, the courts have experienced no difficulty exercising their responsibilities; on the contrary, to the extent formal criteria are provided the practical scope of review may be contracted since nearly every first-degree murder case contains

some "aggravating" aspects, however defined, that would sustain a death sentence.

Thus, we suggest, nothing in the Constitution compels the States to do what no jurisdiction has found necessary or wise: formulate "sentencing standards" for juries in capital cases.

II

A. Although six States have by recent statute decided to separate capital (or all felony) trials into two stages, focusing separately on guilt and on punishment, no court has held such a procedure mandated by the Constitution in any context. This Court itself on several occasions has declined to find bifurcated trials constitutionally compelled, noting to the contrary that they are essentially alien to our criminal jurisprudence. Our system of criminal procedure assumes that a criminal trial is essentially an integated disposition of all jury-triable issues, and it has never been held constitutionally necessary to isolate even complex issues for separate jury trials.

B. Petitioner Crampton's insistence that the unitary trial creates an impermissible tension between two constitutional rights is multiply defective. The contention that in order to protect his privilege against self-incrimination he must forego his "right to speak to his sentencer"—or vice versa—erroneously assumes a constitutional foundation for that latter "right." This Court has often held that a convicted defendant does not have the right to participate personally in the sentencing process by advanc-

ing considerations to which the sentencer should advert in fixing punishment. To the extent such considerations can be presented, they may be presented through other defense witnesses while the defendant relies on his own privilege to remain silent.

Whenever an accused desires to be heard on some issue relating to the finding of guilt, he is vulnerable to examination on any other relevant issue and he assumes the risk that his testimony may prove self-defeating. A defendant who wishes personally to testify in favor of mitigating circumstances can do so at his guilt trial but he has no more constitutional basis for complaining that the punishment issue has not been severed than does a defendant who would prefer to confine his testimony to a one-sided disclosure on an alibi issue. That the State could make available procedures for separate trials on different issues does not establish that the privilege against self-incrimination compels this course.

The accused being tried for murder in a one-stage trial faces the very same tactical pressures that inhere in every criminal prosecution. In some circumstances it may seem desirable to take the witness stand and in others it may not. As the Court's guilty-plea cases last Term demonstrate, the practical necessity of making difficult choices in defending a criminal charge, including a capital charge, does not establish that the procedures which occasion the election impermissibly burden the rights involved.

C. Nor is there substance to the arguments of various *amici* that unitary trials unconstitutionally pre-

vent the sentencing jury from obtaining access to information needed for rational sentencing. The States have the freedom to determine as a matter of penal policy that the "punishment should fit the crime" and thus may authorize that sentence be fixed in light of the circumstances of the crime as developed at trial. This Court has never held that the Constitution requires consideration of anything akin to a pre-sentence report before a convicted murderer can be sentenced.

The realities of murder trials, in any event, show that even where evidence related solely to penalty is not admissible the jury receives a reasonably accurate picture of the defendant on trial. These background details may come out in a variety of ways but they suffice to satisfy whatever minimum level of information might conceivably be argued to be indispensable to intelligent sentencing.

Finally, there is considerable uncertainty about the actual effect of holding separate penalty hearings. Various courts and commentators have suggested that the procedure may generally operate to the disadvantage of defendants because such a hearing does not significantly enlarge the defendant's ability to bring favorable evidence before the jury but does open up such critical areas as the accused's prior criminal record for exposure to the jury. It would thus be unwise to hold that bifurcation is so great an improvement over the present unitary trial system that due process demands it, when it is possible that it encourages death sentences.

ARGUMENT

I

THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT STATE LEGISLATURES PRESCRIBE STATUTORY STANDARDS TO GUIDE OR GOVERN THE JURY'S DETERMINATION OF SENTENCE IN A CAPITAL CASE

The petitioners in both cases argue that their death sentences are constitutionally invalid. One claim, common to both cases, rests on the fact that the statutes under which they were tried and convicted for first degree murder entrusted to the jury the decision whether a death sentence should be imposed but did not establish any explicit criteria for making that decision. This absence of statutory standards, they argue, denies them due process and equal protection of the law under the Fourteenth Amendment.

It is unclear whether petitioners contend that such criteria would define the factors which the jury must find to be present or absent in order to fix a capital sentence, or would simply enumerate some considerations on which the jury should reflect. In either event, it is our view that the United States Constitution does not mandate the formulation of any such criteria for this purpose.

A. HISTORICALLY, SENTENCING DISCRETION, WHETHER ENTRUSTED TO JUDGE OR JURY, IN CAPITAL AND NON-CAPITAL CASES, HAS NOT DEPENDED ON LEGISLATIVE CRITERIA

1. Introduction: the attack on "standardless" sentencing in these cases implicates all felony sentencing

In order to assess petitioners' constitutional claims, their actual context and likely implications should

be clear. Although the issue is narrowly cast as a challenge to "standardless" *jury* discretion in fixing the sentence in a *capital* case, the arguments advanced in support of the position would seem to apply equally to any sentencing, whether by a judge or by a jury, and whether the offense is maximally punishable by death, life imprisonment, or a variable term of years.

Throughout our history, a developing penology has tended to expand, rather than to contract, the discretion given to the sentencing organ to deal with a convicted felon. This Court expressly recognized this historical experience in one of the cases which, we believe, stands directly in the way of petitioners' contentions, *Williams* v. *New York,* 337 U.S. 241 (1949), where the Court upheld a death sentence imposed by a judge in the exercise of discretion uncontrolled by any statutory standards. The Court there noted an important, and here pertinent, distinction between the standards and procedures necessarily surrounding the determination of guilt and the flexibility and discretion properly inhering in the sentencing process:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law. (337 U.S. at 246; footnotes omitted.)

The Court also observed that modern developments like indeterminate sentences and probation "have resulted in an increase in the discretionary powers exercised in fixing punishments." 337 U.S. at 249.

In a later case, the Court rejected a claim that a sentencing judge had failed to accord due process of law in electing to impose a death sentence after a guilty plea, without making use of a procedure for hearing evidence in aggravation or mitigation of penalty; the procedure followed was found sufficient because the penalty decision rested with the judge "in the exercise of his sound discretion." See *Williams* v. *Oklahoma,* 358 U.S. 576, 585 (1959).

Especially in setting prison sentences in non-capital cases, the range of alternatives open to a sentencing judge is even more expansive than in a capital case, where the sharp distinction separating the alternatives, life and death, unquestionably clarifies and illuminates the choice to be made. Yet, even in such cases, sentencing judges are for the most part not provided with "external legislative guidelines which delineate sentencing factors and their relative weight."[6]

In recent years, there have been efforts on several fronts to introduce comprehensive changes in the present American sentencing structure, and among the techniques proposed is legislative formulation of the considerations that are to be weighed in deter-

[6] See *Sentencing Disparity*: *Causes and Cures*, 60 J. Crim. L., Criminol. & Pol. Sci. 182 (1969). See also, Dawson, Sentencing: The Decision as to the Type, Length, and Conditions of Sentence 379–380 (Am. Bar Foundation 1969).

mining sentence.[7] We do not question that much of this concern is legitimate; nor do we deny that legislatures may appropriately attempt to devise and codify sentencing guidelines. Our disagreement is simply with the argument that the Constitution requires such an approach, either in capital or non-capital cases.

A ruling in favor of petitioners' constitutional claims would inevitably implicate the validity of all American felony sentencing. The viability of a constitutional distinction between the "process due" in capital and non-capital cases[8] finds little support in our jurisprudence.[9] Indeed in *Williams* v. *New York, supra,* 337 U.S. at 251, the Court refused to accept such a contention "that we should draw a constitutional distinction as to the procedure * * * where the death sentence is imposed."

Nor is it likely that a ruling in petitioners' favor

---

[7] See, *e.g.*, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 145 (1967); American Bar Association, Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures 108 (Tent. Draft 1967); Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904, 922 (1962); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453, 1454–1459 (1960). See, also, Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405 (1968).

[8] See *Reid* v. *Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

[9] See, *e.g.*, the progression from *Powell* v. *Alabama*, 287 U.S. 45 (1932), through *Betts* v. *Brady*, 316 U.S. 455 (1942), to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

on this point could rationally be confined to jury sentencing.[10] The identity of the sentencing authority, we believe, has little to do with the constitutional need, *vel non*, for statutory standards. The existence of discretion remains the same, as does the inherent possibility that sentences in apparently similar situations may vary from case to case, and from sentencing tribunal to sentencing tribunal. Constant too is the absence of extrinsic criteria on which defendants (or prosecutors) can focus in seeking to affect the sentencing decision.[11] Thus, it is in this larger context that the precise issue tendered by petitioners must be viewed. We turn now to that precise issue.

2. Jury sentencing discretion is firmly established in American criminal law.

(a) *Jury-Sentencing in Non-Capital Cases.* The power and responsibility of a judge to exercise broad

[10] Several courts have expressed this awareness in rejecting challenges to "standardless" jury sentencing. See, *e.g.*, *Bell* v. *Patterson*, 279 F. Supp. 760, 766 (D. Colo. 1968), affirmed, 402 F. 2d 394 (C.A. 10, 1968); *State* v. *Johnson*, 34 N.J. 212, 168 A. 2d 1, 10, appeal dismissed for want of substantial federal question, 368 U.S. 145, certiorari denied, 368 U.S. 933 (1961).

[11] The same situation also prevails later on in the sentencing process when the Executive is called upon in a capital case to grant a reprieve or commute a death sentence. "Standardless" discretion is involved, and the considerations actually brought to bear seem to overlap with those involved in the initial fixing of sentence by judge or jury. See Kalven & Zeisel, The American Jury, 445–448 (1966). This Court has already held compatible with due process the exercise of that discretion without adversary hearing or judicial review, pointing again to the distinction between the procedures necessary for a fair trial of guilt and the flexibility appropriate during the post-conviction process. See *Solesbee* v. *Balkcom*, 339 U.S. 9, 12–13 (1950).

discretion in determining a criminal sentence without dependence on external legislative criteria is a familiar facet of penal systems generally. In the United States, however, the criminal law has long accorded the jury a unique place in the sentencing process.

In fully one-fourth of the States, the jury trying the question of guilt has the responsibility for fixing the punishment to be imposed in some or all *non*-capital criminal cases.[12] This wide-spread practice dates from our colonial period and represents a "reaction to harsh penalties imposed by judges appointed and controlled by the Crown and to the early distrust of governmental power." [13]

Although there is room to doubt whether there remains as pressing a need for such a role for the jury in our contemporary society, that judgment must necessarily be one that our federal system leaves to the States to decide in accordance with their local customs, traditions, and preferences. Indeed, on two occasions recently this Court has digressed to point out that the constitutional claims being advanced and decided did not call into question the continuing

---

[12] See *Jury Sentencing in Virginia*, 53 Va. L. Rev. 968, 969 n. 2 (1967), citing such statutes from 13 states.

[13] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967).

For largely the same reasons, from colonial times through much of the last century, juries in many States were also empowered to be the final judges of the law as well as of the facts in criminal (and civil) trials. See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170, 171–176 (1964).

validity of this jury function. In *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967), in affirming a death sentence imposed by a jury in a single-stage guilt-and-recidivist trial, the Court noted that the accused was not attempting to assert "that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in capital or other criminal cases * * *." And in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 405, n.8 (1966), a case on which petitioners strenuously seek to rely, the Court carefully noted that by its holding against a peculiar Pennsylvania statute authorizing a jury in its unfettered discretion to assess costs against an *acquitted* defendant, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to the juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."[14]

The principal policy objection to jury sentencing in non-capital cases seems to focus on the jury's lack of access to a pre-sentence report and its unfamiliarity with prison conditions, programs, and alternatives, all of which make it difficult to make a reasoned choice on how long a prison term to set for a particular offender.[15] Even at the non-constitutional level of policy, however, these objections would not be apt in

[14] See, also, *Fitzgerald* v. *Peyton*, 303 F. Supp. 467, 470 (W.D. Va. 1969), holding that Virginia's practice of allowing juries to impose "such punishment as you consider just under the evidence and within the limits stated in the Court's instructions" does not violate fundamental fairness or any specific constitutional right.

[15] See *Jury Sentencing in Virginia*, *supra*, 53 Va. L. Rev. at 976–979.

capital cases, where the choice of alternatives—death or life imprisonment—is more limited and where that choice is based on common human experience and community conscience, rather than on penological expertise.[16] Significantly, the 1967 Report of the President's Crime Commission confined its recommendation that jury-sentencing be eliminated to jury sentencing in *non-capital* cases.[17]

(b) *Jury-Sentencing in Capital Cases.* For the reasons which follow, the United States takes the position that the death sentences imposed on the petitioners in these two cases are not invalid on any constitutional grounds.[18] To aid in the assessment of

---

[16] The possibility of rehabilitation and the prospect of release are not, currently, practical concerns in a capital case, since even with a life sentence the theoretical chance for parole, available in some States, is usually postponed by statute for many years and is not often, at present, actually attained. See Powers, Parole Eligibility of Prisoners Serving a Life Sentence 23–45 (Mass. Correctional Ass'n 1969).

[17] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 145 (1967).

[18] There are a number of theoretical constitutional challenges to death sentences that are not properly before the Court. First, Crampton's petition for certiorari posed the question whether the death penalty constitutes "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments, but the grant of certiorari, 398 U.S. 936, was limited to exclude that question. See, also, *Wilkerson* v. *Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 452 (1947) (all rejecting such objections to the execution of the death penalty). Second, in both petitions, questions based on *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), and involving the exclusion of jurors opposed to capital punishment, were raised but those too were excluded

the precise challenge being made to "standardless" jury sentencing in capital cases, we think it will prove useful to make a brief excursion into the origins and history of this practice.

By the end of the eighteenth century, a considerable variety of crimes carried an automatic death sentence upon conviction. The evident harshness of this practice, coupled with the construction of prisons where serious felons could be securely confined to serve a non-capital punishment, led to the reduction in the number of capital crimes. The treatment of murder, however, created some special problems, since it was then as now generally considered the most serious type of crime, but lawyers and juries recognized that not all murders deserved identical punishment. With considerable regularity, juries preferred to acquit certain murderers rather than to send them automatically to their deaths.

In 1794, at the urging of distinguished reform-minded lawyers like William Bradford, Pennsylvania devised an apparent solution to the problem: Legislatively dividing murder—an intentional and unjustified homicide—into two degrees, one defining a

---

by the limited grants of certiorari, 398 U.S. 936. Third, neither the California statutes nor the Ohio statute involved in the instant cases present a problem under *United States* v. *Jackson*, 390 U.S. 570 (1968), since neither State provides that the death penalty may be imposed only on a person who insists upon trial by jury. See, generally, *Calloway* v. *United States*, 399 F. 2d 1006, 1009, n. 4 (C.A.D.C.), certiorari denied, 393 U.S. 987 (1968); Poe, *Capital Punishment Statutes in the Wake of United States* v. *Jackson: Some Unresolved Questions*, 37 G.W.L. Rev. 719 (1969).

class of murders for which the death penalty was provided, and the second covering murders where the extreme penalty was thought unwarranted.[19] This approach sought to predict and circumscribe the types of aggravated murders, without any attention to or room for mitigating factors in the particular instances. Pennsylvania's legislative division, segregating murders committed after premeditation and deliberation or in the course of a felony from all others, was copied over the years in most of the other States.[20]

This approach to the problem soon proved to be far from wholly adequate or satisfactory. The degree device continued much of the rigidity of the earlier common law punishment for murder—death automatically upon conviction—but simply narrowed the type of crime that was subject to the penalty. Even within that narrowed category, however, juries repeatedly considered the inevitable death penalty inappropriate in light of the facts of particular "premeditated" or "felony-murders".

A new way of confronting the problem then emerged. The nature of the difficulty was that the community, as reflected in the jury, refused to agree that every "first degree murderer" should, by reason of an abstract legislative definition, ineluctably be

[19] Pa. Laws 1794, ch. 257.

[20] See, generally, Bradford, An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania 35–39, 72–74 (1795); Bedau, The Death Penalty in America 1–8 (rev. ed. 1967); A.L.I. Model Penal Code § 201.6, Comment, pp. 65–66 (Tent. Draft No. 9, 1959); Great Britain, Select Committee on Capital Punishment, Report ¶¶ 11, 17 (1930).

marched to the gallows. This dissatisfaction was expressed through the jury's power to nullify the death penalty on a case-by-case method: by returning a verdict of guilty of a lesser crime or by outright acquittal. At stake were the integrity of the jury system and the societal interest in just conviction and fair punishment; the background was the wide-spread phenomenon of jury-sentencing in non-capital cases. In that context, the States devised an accommodation that in retrospect seems eminently sensible: legislatively eliminating the mandatory death penalty for first-degree murder and officially sanctioning the jury's right to determine the penalty on a case-by-case basis.

Our research indicates that Tennessee was the first State to enact such legislation. The Act of January 10, 1838, provided in part: [21]

> * * * in all cases hereafter to be tried, where any person is convicted of murder in the first degree, if the jury who try him should be of the opinion that there were mitigating circumstances in the case, and shall so state in their verdict, then in such case it shall be the duty of the court to sentence the defendant to confinement in the Penitentiary for life * * *.

This type of statute, authorizing the jury in a capital case to exercise its own judgment on whether the death penalty was warranted, was quickly adopted

---

[21] Tennessee Laws 1837–1838, ch. 29. See *Gohlson* v. *State*, 143 Tenn. 126, 223 S.W. 839 (1920).

in a number of other States.[22] Alabama in its 1841 Penal Code introduced such discretion; Louisiana and Texas followed suit in 1846 and 1858, respectively, and provided that the jury's power extended to all capital cases, not only murder. By 1868, when the Fourteenth Amendment was ratified, Georgia, Illinois and Minnesota had also added similar provisions, and by 1878 fifteen States and territories had chosen to authorize their juries in capital cases to determine whether the defendant, upon conviction, should actually die for his crime. Before the end of the last century, twenty-three States and territories plus the federal government had enacted laws authorizing the "standardless" discretion attacked in the present cases.

Except for four States that abolished capital punishment in the middle of the nineteenth century (Maine, Michigan, Rhode Island, and Wisconsin), every other American jurisdiction has at some point enacted a statute of this type, so that at present in all but two of the jurisdictions that retain capital punishment for murder the jury determines in its discretion whether the penalty of death will be imposed.[23] The current statutes so providing are listed in Appendices C and D, *infra,* pp. 132–137.[24]

---

[22] Appendix B, pp. 128–131, *infra*, chronologically lists the introduction of jury discretion on capital sentencing in each American jurisdiction.

[23] Both of those two exceptional States authorize the death penalty only for murder committed while serving a life sentence: Rhode Island makes the death penalty mandatory in such a situation, and North Dakota permits the judge to decide the punishment. See App. C, *infra*, p. 132, fn. 1.

[24] Appendices E and F, *infra*, pp. 138–140, summarize the status

Furthermore, the legislative acceptance of this type of provision by the various States has been steady and continuous over the last 130 years. No momentary "fad" or mere experiment in criminal procedure, jury discretion in capital cases has been adopted in State after State right up through recent years. Pennsylvania, which had introduced the degree system in 1794, added jury discretion to its penal laws in 1925.[25] New York adopted the same course in 1937, with Connecticut and Massachusetts, for example, doing so in 1951, Hawaii in 1955, and the District of Columbia in 1962.[26]

The two States whose murder statutes are being challenged in the present cases were among the relatively early adherents to this legislative approach. California first authorized jury discretion as to the penalty for murder by the Act of March 28, 1874.[27] And Ohio enacted such a provision in 1898.[28]

---

and effect of death penalty provisions in federal civil and military statutes. Only one (military) offense carries a mandatory death penalty (spying); all but three of the thirty other capital statutes leave the determination of penalty to the trier of fact on the issue of guilt, whether that happens to be the jury, a judge, or a court martial.

[25] Pa. Pub. Laws 1925, ch. 411. See Schwartz, *Punishment of Murder in Pennsylvania*, in II Royal Commission on Capital Punishment, Memoranda and Replies to a Questionnaire 776, 777 (1952).

[26] Five States, Iowa, Colorado, Washington, Oregon and Kansas, first adopted jury discretion in capital murder cases when they re-introduced capital punishment following varying periods as "abolition" States. See Appendix B, *infra*, pp. 129–130.

[27] Calif. Amendatory Acts 1873–1874, ch. 508, p. 457.

[28] 93 Ohio Laws 223.

This clear pattern of legislative selection of the very practice challenged in these cases has been complemented by consistent judicial approval. This Court, for example, has for at least a century been called upon to review convictions under these statutes and has without exception commented favorably on them. See, *e.g., Wilkerson* v. *Utah,* 99 U.S. 130, 136 (1879); *Ex parte Crow Dog,* 109 U.S. 556, 560 (1883); *Calton* v. *Utah,* 130 U.S. 83, 86–87 (1889); *Winston* v. *United States,* 172 U.S. 303, 310–313 (1899); *Andres* v. *United States,* 333 U.S. 740, 742–744 (1948); *Spencer* v. *Texas,* 385 U.S. 554, 557 (1967); *Witherspoon* v. *Illinois,* 391 U.S. 510, 519 (1968).

In *Calton, supra,* the Court reviewed a murder conviction and death sentence under the 1876 Utah territorial statute which made a death sentence automatic unless the jury recommended mercy. Failure to advise the jury of their power under the statute to affect the penalty was held reversible error. The Court explained: "The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice." 130 U.S. at 86–87.[29]

In *Winston,* the Court had before it the 1897 amendment to the federal murder statute authorizing the jury to direct upon conviction: "without capital

[29] See, also, Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. Pa. L. Rev. 1099, 1102 (1953).

punishment". The opinion for the Court in that 1899 decision observed (172 U.S. at 310):

> The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment instead of by death. That end has been generally attained in one of two ways.[30]

The first way discussed by the Court was the degree system, allowing the jury "to say whether the facts made a case of murder in the first degree or murder in the second degree" (172 U.S. at 312), and thus capital or non-capital. The opinion then continues (*ibid.*):

> Second. The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the Act of 1897.
>
> The Act of Congress confers this right upon the jury in broad and unlimited terms * * *.

The Court pointed to its earlier decision in *Calton, supra,* and other cases (*ibid.*)

> as illustrating the steadfastness with which the full and free exercise by the jury of powers

[30] See, also *Andres* v. *United States*, 333 U.S. 740, 752–753, 767–77 (1948) (Frankfurter, J., concurring, together with Appendix).

> newly conferred upon them by statute in this matter has been upheld and guarded by this court against the possible effect of any restriction or omission in the ruling and instructions of the judge presiding at the trial.

In light of the Court's determination to respect and enforce the clear legislative design of allowing the jury unfettered discretion, the trial court's attempt to restrict the jury's freedom was held reversible. Although that ruling that the trial judge erred in trying to impinge upon the jury's discretion under a statute like the present ones does not directly affirm the constitutionality of such legislation, the Court's language indicates awareness of the wisdom of this legislative choice (172 U.S. at 313):

> The Act does not itself prescribe nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may

> exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

Later, in the *Andres* case, the accused under sentence of death urged before this Court that under that same statute the trial judge was required "to explain to the jury the scope of their discretion in granting mercy to the defendant." 333 U.S. at 742. The Court rejected this contention, upholding the correctness of an instruction that advised the jury simply (333 U.S. at 743 n. 4):

> This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

This type of judicial determination not to detract from the full sentencing discretion given to the jury in capital cases has been uniform and consistent up through the present. In addition, the various legislatures have consistently chosen to adhere to this same policy. Since 1959, when the American Law Institute as part of its Model Penal Code first actually published proposed "aggravating circumstances" and "mitigating circumstances" designed to be included in murder statutes and to control the jury's sentenc-

ing discretion,[31] a number of States have revised their criminal codes and to one extent or another adopted various proposals included in the Model Penal Code.[32] Still other States have considered and enacted amendments dealing with their murder statutes.[33] Yet, none

[31] See ALI, Model Penal Code § 201.6 (Tent. Draft No. 9, 1959). As revised, approved and promulgated by the Institute, these criteria are now part of § 210.6 of the Proposed Official Draft dated 1962. This section is quoted in its entirety in Appendix G, *infra*, pp. 141–145.

The National Commission on Reform of Federal Criminal Laws in Section 3605 of its Study Draft of a New Federal Criminal Code (1970) has also proposed "criteria" for assessing the punishment of the capital crimes of murder and treason. This provision is set out in Appendix G, *infra*, pp. 148–149.

[32] New criminal codes have been adopted in the following States (by year of effective date): Illinois (1961), Texas (Code of Criminal Procedure, 1965), New York (1967), Georgia (1969), Kansas (1970), Connecticut (1971). The pertinent citations appear in Appendices C and D, *infra*, pp. 132–137.

Among the changes proposed by the Model Penal Code and accepted are: bifurcation of guilt/penalty trials in murder cases (New York, Texas, Georgia, Connecticut), and criteria for judges in sentencing to probation (N.Y. Penal Law § 65.00; Conn. Penal Code § 29), or in fixing minimum prison sentences or fines (Kan. Stat. Ann. §§ 21–4606, 21–4607). See, generally, *Sentencing Disparity: Causes and Cures*, 60 J. Crim. L. Criminol. & Pol. Sci. 182, 186–191 (1969).

The underlying premise of the Model Penal Code's proposals in this area is that there is a general need for greater legislative control of sentencing discretion. That premise is debatable and the Code's approach in this area has not generally been followed. See Dawson, Sentencing: The Decision as to the Type, Length, and Conditions of Sentence 380–381 (Am. Bar Foundation 1969).

[33] See, *e.g.*, the 1969 amendment to New Mexico's murder statute limiting the applicability of the death penalty and the 1969 Nebraska amendment providing for capital sentencing by the court after guilty plea or a jury-waived trial, as listed in Appendix C, *infra*, p. 134.

of these States has found it desirable as a matter of penal policy to adopt statutory "standards" or "criteria" to control the jury's determination whether to impose a death sentence upon conviction of a crime for which that penalty is authorized. On the contrary, even in the face of academic proposals for such standards and for the elimination of jury discretion in these cases, the legislatures of all of these States have unanimously concurred in preserving undiluted this discretionary role for the jury.[34] At this moment, not a single state legislature has found it desirable or appropriate to circumscribe the jury's weighty responsibility in this area.

The virtual unanimity of the jury-discretion system in capital cases, carefully, consistently, and deliberately developed over more than a century, provides a strong presumption of its compatibility with the Constitution. Only last term this Court sustained the constitutionality of state grants of property-tax exemptions to churches, relying in part upon this prudent respect for the verdict of history. See *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). The Chief Justice's opinion for the Court is instructive on this point (397 U.S. at 678):

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span

[34] Cf. *Commonwealth* v. *Ross*, 413 Pa. 35, 195 A. 2d 81, 86 (1963), where the court sustained a death sentence for murder fixed after a separate penalty hearing in which the trial court had brought the Model Penal Code criteria to the jury's attention and then advised them that they were free to ignore them.

> of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly fifty years ago, Mr. Justice Holmes stated:
>
> "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. * * *" *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Although discretion in capital cases made its appearance in the middle of the last century, other cases reflecting the same regard for history as does *Walz* establish that a particular procedure of state criminal law need not stretch back into the colonial era in order to merit such a presumption of validity.[35] In *Spencer* v. *Texas*, 385 U.S. 554 (1967), the Court sustained the validity of a Texas statute that brought the prior criminal record of a defendant charged with a capital crime directly before the jury to enable it to assess his punishment in light of his recidivism. Referring to "the long-standing and wide-spread use that attend the procedure under attack here," the Court found it "impossible to say" that "the possibility of some collateral prejudice" rendered the procedure "unconstitutional under the Due Process Clause." (385 U.S. at 564).

---

[35] Of course, as we have seen, the extant, related practice in a number of States of allowing jury sentencing in *non*-capital cases does pre-date the Constitution.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court sustained Florida's notice-of-alibi statute, commenting: "We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair trial'." (399 U.S. at 81). That there was a legitimate State interest in adhering to such a procedure was implied from the fact that notice-of-alibi statutes were in force "in a substantial number of States"—sixteen by the Court's count—and dated "at least from 1927". (399 U.S. at 81–82).[36]

Moreover, the precise constitutional contentions presented by petitioners in the present cases are not novel. On the contrary, over recent years they have become a routine ingredient in attempts to secure reversal of convictions accompanied by death sentences, since no capital statutes in the United States impose specific conditions upon the jury's determination of sentence. After respectful and serious consideration, however, every American court, federal or state, that has had occasion to pass upon the issue has concluded

[36] See, also, *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969), where the Court regarded as "long established constitutional doctrine" a principle announced in 1896, which had been followed "for almost 75 years."

Compare *Baldwin* v. *New York*, 399 U.S. 66 (1970). There New York City's denial of a right to jury trial in offenses punishable by a year in jail was held invalid. The plurality opinion by Mr. Justice White pointed out that New York City was the only American jurisdiction in that category. 399 U.S. at 72.

that the Constitution requires no such sentencing standards for an American jury.[37]

This rare combination of universal legislative acceptance and uniform judicial approval must clothe the jury discretion system with a substantial presumption of constitutionality. To hold in light of this history that an accused is denied "due process of law" when his sentence in a capital case is determined by a jury exercising unimpaired discretion would necessarily carry with it the finding that for more than a hundred years the legislatures of the 46 States that have enacted such laws, plus Congress, as well as the federal and state courts throughout the country—including this Court—have heretofore failed to perceive unfairness and arbitrariness so intense as to violate minimum constitutional standards.

Moreover, petitioners point to no specific constitutional right that allegedly forbids this prevalent sys-

---

[37] See, *e.g.*, *Petition of Ernst*, 294 F. 2d 556, 560–561 (C.A. 3, 1961), cert. den., 368 U.S. 917; *Florida ex rel. Thomas* v. *Culver*, 253 F. 2d 507, 508 (C.A. 5, 1958), cert. den., 358 U.S. 822; *Pope* v. *United States*, 372 F. 2d 710, 731 (C.A. 8, 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); *Maxwell* v. *Bishop*, 398 F. 2d 138, 148–150 (C.A. 8, 1968), vacated on other grounds, 398 U.S. 262 (1970); *Sims* v. *Eyman*, 405 F. 2d 439, 447 (C.A. 9, 1969); *Segura* v. *Patterson*, 402 F. 2d 249, 254 (C.A. 10, 1968); *United States ex rel. Smith* v. *Nelson*, 275 F. Supp. 261, 265–266 (N.D. Calif. 1967); *Bell* v. *Patterson*, 279 F. Supp. 760, 765–767 (D. Colo.), aff'd, 402 F. 2d 394 (C.A. 10, 1968); *McCants* v. *State*, 282 Ala. 397, 211 So. 2d 877, 880–881 (1968); *Bagley* v. *State*, 247 Ark. 113, 444 S.W. 2d 567, 570 (1969); *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968); *State* v. *Walters*, 145 Conn. 60, 138 A. 2d 786, 792–794 (1958), app. dis'd and cert. den., 358 U.S. 46; *Wilson* v. *State*, 225 So. 2d 321, 324 (Fla. 1969); *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 730, 734

tem. They rely simply on the general principle of fundamental fairness always recognized as implicit in the Due Process Clause. Thus, we are not concerned with a procedure that must be reassessed in the wake of recent constitutional developments placing a new perspective on the meaning of a constitutional clause or newly holding a provision of the Bill of Rights applicable to the States. Nor is the Court presented with any freshly assembled data to establish that as a matter of fact the jury-discretion system operates unfairly in practice; on the contrary, as we shall discuss below (pp. 69–77), recent studies in this field tend to confirm the wisdom and rationality of authorizing unencumbered jury discretion in capital sentencing. All petitioners adduce is a series of rhetorical constructs that fall far short of demonstrating fundamental unfairness because they rest on ill-founded legal assumptions and groundless factual speculations.

(1968); *State* v. *Latham*, 190 Kan. 411, 375 P. 2d 788, 797–799 (1962), cert. den., 373 U.S. 919; *Duisen* v. *State*, — Mo. —, 441 S.W. 2d 688, 692–693 (1969); *State* v. *Johnson*, 34 N.J. 212, 168 A. 2d 1, 10–11, appeal dismissed for want of substantial federal question, 368 U.S. 145, cert. den., 368 U.S. 933 (1961); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181, 193–194 (1968); *People* v. *Fitzpatrick*, 308 N.Y.S. 2d 18, 24 (Co. Ct. 1970); *State* v. *Roseboro*, 276 N.C. 185, 171 S.E. 2d 886, 893 (1970); *Hunter* v. *State*, — Tenn. —, 440 S.W. 2d 1, 16 (1969); *State* v. *Kelbach*, 23 Utah 2d 231, 461 P. 2d 297, 299–300 (1969); *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E. 2d 725, 729–730 (1968); *State* v. *Smith*, 74 Wash. 2d 744, 446 P. 2d 571, 589–590 (1969). Cf. *Andres* v. *United States*, 333 U.S. 740, 743–744 (1948). The *Forcella*, *McCants*, *Roseboro*, and *Smith* cases are pending on petitions for certiorari.

B. JURY DISCRETION IN CAPITAL SENTENCING SERVES A LEGITIMATE GOVERNMENTAL INTEREST

To the extent that it is necessary to examine the affirmative justifications for the present system of authorizing juries to exercise sentencing discretion in capital cases without formal statutory "standards," a variety of appropriate objectives will emerge.

Flexibility is the hallmark of modern sentencing philosophy. The objective is to tailor the sentence, to some extent, to the offender as well as to the offense. We assume that petitioners do not assert that the Constitution forbids a general legislative policy of providing sentencing alternatives for various crimes, including murder. Certainly, no one would seriously propose a return to the rigorous eighteenth century practice of punishing *all* persons convicted of murder with death. On the other hand, and by the same token, the Constitution cannot be said to *require* that all murderers equally receive life sentences (although we do not deny the legislature's power to make this choice). Despite the superficial uniformity in such a course, there is real inequality in treating identically a variety of persons who are different in essential characteristics and who have committed crimes factually distinguishable even if legally similar.[38]

Nor do we understand petitioners' argument to be that the jury is constitutionally incapable of exercising such discretion. Historically, as we have seen, jury

[38] See *Scott* v. *United States*, 419 F. 2d 264, 282, n. 3 (C.A.D.C. 1969) (Leventhal, J., concurring). See also *Stephens* v. *Turner*, 421 F. 2d 290, 292 (C.A. 10, 1970).

sentencing in felony cases has its roots in the colonial period, and jury discretion in capital cases was given with the avowed objective of individuating punishment.[39]

Once it is conceded or established that the Constitution permits sentencing discretion and allows the jury to be the organ for exercising that discretion, the arguments in favor of constitutionally mandated standards soon fall of their own weight.

One way to expose the fallacy in the arguments advanced in favor of constitutionally required "standards" is to explore the meaning of that term in this context. A reading of the briefs for petitioners and for the *amici* supporting them reveals that despite the frequency of the use of the term, and despite its core position in their constitutional contentions, there is no consensus on what is meant, and even a good deal of internal ambiguity within each brief.

There are two possible meanings that could be assigned to the terms "standards" and "criteria" in these cases. One would signify an exhaustive and exclusive definition of the factual elements which must be found to be present or absent as a condition to imposing a particular sentence. This alternative would make such "standards" the sentencing analogues to the formal elements of a crime. The other possibility would be to understand "standards" to include simply an enumeration of some of the factors that ought reasonably to be considered in determin-

[39] See Bedau, The Death Penalty in America 27 (rev. ed. 1967).

ing a sentence. This latter approach would furnish essentially an informational checklist for the jury's deliberations.[40]

In our view, neither of these alternatives can lay claim to any substantial constitutional foundation.

The former possibility, that of constructing a definition of the elements of capital as distinguished from non-capital murders, is nothing less than regression to the long discredited attempt to decide legislatively in advance that a precise and rigid punishment is to be imposed for committing a particular crime. As such, it contradicts the trend of modern sentencing philosophy and ignores the lesson of our experience with the failure of legislative grading through the degree system.

A call for formal, binding, exhaustive, and exclusive elements for capital sentencing would in essence demand that the States redefine their homicide laws and distinguish between the types of homicide that must be punished with death and those that can not be. Any freedom or flexibility within these categories would, of course, simply perpetuate the practice that (on this alternative reading of petitioners' position)

[40] To the extent that the latter meaning may be intended, there would seem to be no significant reason why the criteria would have to be included in a statute. A model jury instruction approved by the bench or bar, or even an original charge devised by the trial judge, would appear to satisfy this open-ended approach, at least to the extent that it included a number of important factors and did not encourage reliance on any irrational or illegal ones.

is challenged: the jury's discretion to select from among authorized alternative punishments.[41]

Historical experience has proven that it is supremely unwise to try, in advance of development of the peculiar circumstances of the offense and of the offender, to prescribe legislatively whether the punishment will be death. In this country, as we have seen, a number of States after 1794 legislatively graded murders into a capital degree and a non-capital degree. The distinction rested on the premise that murders committed after deliberation or in the course of committing certain forcible felonies like rape or robbery warranted the death penalty—and that only such homicides did. However, as Professor Herbert Wechsler, Chief Reporter for the Model Penal Code, has summarized:

> A rigid legislative definition of the cases where the sentence should be death has proved to be unworkable in practice, given the infinite variety of circumstances that attend even the heinous crimes. Therefore, it is inevitable that the jury or the court be given the power to decide whether the punishment should be imposed.[42]

---

[41] The Model Penal Code criteria have been criticized on this ground, that they still leave discretion to the jury. See *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1302, 1422–1423 (1969).

[42] Wechsler, *Symposium on Capital Punishment*, 7 N.Y.L.F. 250, 259 (1961).

In another context Professor Wechsler reviewed the reason for the failure of the attempt to make capital murders coextensive with premeditation:

> The basic difficulty was, of course, that no single aspect of mentation could provide a viable criterion for this purpose without reference to other circumstances too complex to be encompassed in the rule.[43]

In recognition of the practical unsoundness of the ambitious American experiment with legislative grading,[44] the British repeatedly rejected efforts to follow the American course as essentially "drawing an arbitrary line" without regard for individual variations.[45] After the most comprehensive study of the problem that has yet been done, the British Royal Commission on Capital Punishment categorically rejected legislative attempts to formulate distinctions between capital and non-capital murders:

> There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics

---

[43] Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1446 (1968).

[44] See 3 Stephen, History of the Criminal Law of England 94 (1883): "As much cruelty, as much indifference to the life of others, a disposition at least as dangerous, is shown by sudden as by premeditated murders."

[45] Great Britain, Select Committee on Capital Punishment, Report ¶ 169 (1930).

> of the offence, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion. * * * The essence of these objections is that, as was said in the Home Office memorandum, "there are not in fact two classes of murder but an infinite variety of offences which shade off by degrees from the most atrocious, to the most excusable"; that the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a single formula; and that among the most important factors are the motive of the offence and the character and circumstances of the offender, which can never be inferred from the legal quality of his criminal act."

Thus, the Commission concluded, it is not feasible to provide a fair, rational, and comprehensive statutory definition of a category of murder exclusively and automatically capital. Instead, the Commission recommended that the death penalty should continue to apply to all cases of common law murder unless the jury found that there were "extenuating circumstances." These circumstances, the Commission reported, would have to be left undefined "for the same

---

"Great Britain, Royal Commission on Capital Punishment, 1949-1953, Report ¶ 498 (1953).

reasons for which we have found it impossible to define degrees of murder." [47]

These conclusions, we believe, still carry great weight, and have not, to our knowledge, been undercut by any intervening legislative, judicial, or academic developments. It is just as true today as it was 70 years ago when this Court decided *Winston* v. *United States, supra,* that the "difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances" makes reasonable a legislative preference for "the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment." 172 U.S. at 312. Confirming this datum is the fact that a number of States that have recently revised their criminal codes have abandoned the degree device altogether and instead provided for one crime of murder which may be punished by death if the jury so determines.[48]

---

[47] *Id.*, ¶ 553(b). These proposals were not adopted. Instead, by the Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, §§ 5, 6, Parliament tried to separate capital from non-capital homicides, but the lines drawn were generally recognized to have been utterly arbitrary. Dissatisfaction with this attempt was one of the reasons for the temporary suspension of all capital punishment in 1965, which was followed in December 1969 by complete abolition of the death penalty in England.

[48] See *e.g.*, the Illinois Criminal Code of 1961, the Kansas Criminal Code of 1969, and the Connecticut Penal Code of 1971, cited in Appendices C and D, *infra*, pp. 133, 136. Cf. American Bar Ass'n, Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures (Tent. Draft 1967):

"The legislature can create institutions and programs, can provide the system with funds and facilities, can isolate goals

Due process of law certainly does not compel the States to choose a course that arbitrarily defines crimes, simply so that sentences within the categories will be uniform. It is no response to this point to say that if the States are unable to formulate such statutory standards then they cannot preserve capital punishment. Such an argument at once proves too little and too much. First, it begs the critical constitutional question whether due process requires States to grade crimes into varying degrees, with discrete penalties automatically attaching to each degree. And second, the argument could just as well be made—with evident absurdity—in the context of an armed robbery conviction: if the legislature cannot prescribe statutory standards to determine in advance when a five-year prison sentence will be imposed, and when, for example, a seven-year sentence will be, then the seven-year sentence is unconstitutional.

In either the capital or the non-capital sentencing situation, we believe, it is appropriate to rely on the good faith, moral responsibility, and conscientious judgment of the sentencing organ, whether judge or jury. As Professor Wechsler advised the British

---

and objectives—but it cannot prescribe a proper sentence in advance of the event. (p. 54)

* * * * *

"It would be unwise to attempt the codification of a rigid set of principles which must be employed in an unbending fashion in each case; such an attempt would suffer from many of the same defects which accompany mandatory sentences set in advance by the legislature. It would likewise be unwise to be overly specific." (p. 109).

Royal Commission, the existence of the jury-discretion system in sentencing for murder "compensates substantially for the difficulties of improving the criteria for legislative grading."[49] Legislative selection of this flexible option satisfies the requirements of fundamental fairness under the Due Process Clause.

If the petitioners and *amici* use the term "standards" in the second sense defined above—that of an enumeration of various factors to which the sentencing authority ought to give some thought in considering what sentence to impose—their arguments carry no more force than would an insistence on legislative grading.

It is this illustrative type of "criteria" which the American Law Institute in its Model Penal Code, and the National Commission on Reform of Federal Criminal Laws in its Study Draft of a New Federal Criminal Code have formulated and proposed.[50]

Since the proponents of the attack on "standardless" jury discretion have pointed to the Model Penal Code as illustrating a type of legislative response available,[51] it may prove useful to examine the nature and scope of the Model Code's "criteria" and to view petitioners' constitutional arguments against this backdrop.

---

[49] Wechsler, *Degrees of Murder and Related Aspects of the Penal Law of the United States*, in II Royal Commission on Capital Punishment, Memoranda and Replies to a Questionnaire 783, 785 (1952).

[50] See Appendix G, *infra*, pp. 141–149.

[51] See Brief for Petitioner McGautha, No. 203, pp. 27–28; Brief *Amici Curiae* of the NAACP et al., Nos. 203 and 204, pp. 8–9.

The Reporter's Comments to the Model Penal Code explain that there is fundamental agreement with the British Royal Commission "that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a single formula.'"[52] The Reporter continued:

> We think, however, that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.[53]

Thus, the Model Penal Code simply undertakes to "point to" some of the "main circumstances" of aggravation and mitigation that "should be weighed" in the sentencing process. These criteria are not intended to be exhaustive or exclusive, as is apparent from the Code's proposed direction that, in determining its penalty verdict, the jury "shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) *and any other facts that it deems relevant* * * *".[54] The "weighing" process

---

[52] ALI, Model Penal Code § 201.6, Comment, at 71 (Tent. Draft No. 9, 1959).

[53] *Ibid.* (Emphasis in orginal.) As the emphasized passage indicates the Model Penal Code departs from the British Royal Commission's position that there are too many combinations of aggravating and mitigating factors to permit legislative balancing. See 36 ALI, Proceedings 148 (1959) (remarks of Prof. Wechsler).

[54] Section 210.6(2), Appendix G, *infra*, p. 143. (Emphasis added).

is established by the simple direction that the death penalty is not to be imposed "unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances [whether enumerated or not] sufficiently substantiall to call for leniency." [55]

Thus, the Model Penal Code's ambitions are modest. The decision not to attempt to list every factor that may appropriately be considered, and the failure (and inability, we would think) to assign relative weight to the enumerated factors, still leaves the jury much of its traditional discretion.[56] These "criteria", therefore, serve at most an educational function not akin to standards in the strict sense.[57]

---

[55] *Ibid.* The Study Draft of a New Federal Criminal Code, which is still in tentative form, contains similar criteria adopted from the Model Penal Code (see Section 3605, Appendix G, *infra*, pp. 148–149). That proposed section would provide that court and jury "*may consider* the mitigating and aggravating circumstances set forth in the subsections below." (Emphasis added). Still under consideration is the question whether a finding of at least one aggravating circumstance would be a pre-condition to a death sentence.

[56] See Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. Rev. 50, 74 (1964).

The reference to "mitigating circumstances" was made deliberately "open-ended" simply to carry out the objective that the jury should not look only to aggravating circumstances. See 36 ALI, Proceedings 204 (1959) (remarks of Prof. Wechsler).

[57] See Dawson, Sentencing: The Decision as to the Type, Length, and Conditions of Sentence 218 (Am. Bar Foundation 1969).

In this regard, we point out that there is an inherent difficulty in trying to use "aggravating circumstances" and "mitigating circumstances" as devices for establishing uniformity

The real question thus posed is whether the type of approach illustrated by the Model Penal Code is not only an improvement over the present system but is such a dramatic improvement that the failure of the States to adopt some such criteria leaves the present regime so fundamentally unfair as to deny due process.[58] Both of these alternatives are subject to legitimate doubt.

One recent study has noted that while the Model Penal Code presupposes the need for greater legislative control of sentencing, this premise is debatable

---

in the sentencing process. Depending on the context, the *same* conduct may have the quality of either an aggravating *or* a mitigating element. For instance, the bloodiness of the crime may actually not indicate bestiality and depravity, but may instead evidence a unique combination of provocation and mental and emotional stress.

It is inevitable, and, we believe, desirable, in a system which depends on men and women—juries and judges—and not on computers, in implementing the criminal process that there will be varying assessments of apparently similar conduct, depending on the peculiar facts. See Kalven & Zeisel, The American Jury 438–439, 444–445 (1966). See, also, Speech of Sir Samuel Romilly to the House of Commons (1810), reprinted in Michael & Wechsler, Criminal Law and Its Administration 253 (1940).

Even judges sometimes find themselves unable to agree whether a particular fact in a single case should be regarded as in aggravation or mitigation of a capital murder. Compare *Coleman* v. *United States*, 357 F. 2d 563, 569–570 (C.A.D.C. 1965) (en banc), with *id.* at 578 (Burger, Tamm, Danaher, JJ., dissenting).

[58] Indeed, it is not clear whether even adoption of criteria such as those proposed by the Model Penal Code might not itself lead to a challenge to such standards "as inadequate". See *Time Magazine*, May 25, 1970, p. 67 (remarks of Prof. Anthony Amsterdam).

and the Code's proposals in this area have not been frequently followed."[59]

Many courts, in rejecting arguments about the constitutional need for standards to guide the jury's sentencing discretion, have articulated what is implicit in this uniform decision by state legislatures to omit this proposal of the Model Penal Code from their revised criminal codes, namely, that such standards would be not only superfluous but unwise.[60]

Several policy judgments support this conclusion. The very fact that the decision is one between life and death calls, paradoxically, for caution in formulating abstract criteria that will not eliminate the exercise of discretion but will diffuse the sentencing authority's sense of personal responsibility for the judgment.[61] Any set of "standards" or "criteria" may, by virtue of its goal of establishing some extrinsic determinants for the crucial decision, tend to transfer the locus of responsibility on this unique sentencing decision from the living jury to the lifeless statute. We live in a society where, left to its own sense of responsibility and judgment, the American jury returns a capital verdict in only a fraction of capital trials.[62] Yet it must be conceded that one or more "aggravating factors"—as defined by the Model Penal

---

[59] See Dawson, *supra* note 57, at 380–381.

[60] See, *e.g.*, *Duisen* v. *State*, — Mo. —, 441 S.W. 2d 688, 692 (1969); *Hunter* v. *State*, — Tenn. —, 440 S.W. 2d 1, 16 (1969)

[61] *Cf.* Dawson, *supra* note 57, at 381.

[62] See Bedau, The Death Penalty in America 23 (rev. ed. 1967).

Code or any other conceivable enumeration [63]—accompanies nearly every first-degree murder.[64] Once the legislature particularizes the "aggravating circumstances" that "the State" deems sufficient to warrant the death penalty in a specific case, there is solid reason to anticipate a loss in sensitivity in the sentencing process without any corresponding gain in rationality. Given the realities of the well-documented reluctance of juries under the present system to impose a death sentence,[65] forcing a juror to ask himself why, in light of the presence of a sufficient aggravating circumstance highlighted by the statute, the death penalty should *not* be imposed may overthrow the intrinsic caution of the present system.[66]

---

[63] See, generally, George, *Aggravating Circumstances in American Substantive and Procedural Criminal Law*. 32 U.M.K.C.L. Rev. 14 (1964).

[64] See *Appellate Power to Reduce Jury-Determined Sentences*, 23 Rutgers L. Rev. 490, 528 (1969).

[65] See, *e.g.*, Bedau, The Death Penalty in America 23, 35–36 (rev. ed. 1967); Kalven & Zeisel, The American Jury 436 (1966); ALI, Model Penal Code § 201.6, Comment, p. 73 (Tent. Draft No. 9, 1959), and *id.*, Appendix, pp. 220 *et seq.*

[66] Under the present system such eminently "rational" instructions as that, in considering whether to fix a life sentence, the jury should consider the accused's intelligence and mentality, have been held grounds for reversal as unduly limiting the jury's right to be merciful for no reason at all. *Manor* v. *State*, 223 Ga. 594, 157 S.E. 2d 431, 437 (1967). See, also *State* v. *Worthy*, 239 S.C. 449, 123 S.E. 2d 835, 849 (1962); *Wilson* v. *State*, 225 So. 2d 321, 324 (Fla. 1969); *People* v. *Bandhauer*, 1 Cal. 3d 609, 83 Cal. Rptr. 184, 463 P. 2d 408, 416 (1970); *State* v. *Roseboro*, 276 N.C. 185, 171 S.E. 2d 886, 893 (1970), pending on pet. for cert., No. 5178, O.T. 1970. Compare *Winston* v. *United States*, 172 U.S. 303, 312 (1899).

The Court of Appeals for the Tenth Circuit recently made this point:

> It is axiomatic that the line between contemporary community values and the penal system is filled by the jury's being allowed to be reflective of prevailing social thought. To assert that the adoption of rigid guidelines seeking to control the jury in this respect, thereby substituting merciless standards for present day flexibility, is compelled by due process is clearly untenable.[67]

This last observation brings us to the final justification we deem it necessary to advance as a permissible basis for the present system of "standardless" sentencing: that a State may reasonably find that any set of statutory criteria would unduly stifle or muffle the voice of the "contemporary community" speaking through the jury on the question whether a particular member of society should pay the supreme penalty for his murder.

Historically, as we have seen, it has been thought appropriate to entrust this momentous decision "to the judgment and the consciences of the jury" summoned to try the accused's fate. *Winston* v. *United States, supra,* 172 U.S. at 313. This allocation of sentencing responsibility meshes neatly with the "insistence upon community participation in the deter-

---

[67] *Segura* v. *Patterson*, 402 F. 2d 249, 254 (C.A. 10, 1968). See, also, Comment, *The Supreme Court and Capital Punishment—From Wilkerson to Witherspoon and Beyond*, 14 St. L. U.L. Rev. 463, 483 (1970): "It is doubtful that a detailed list of predetermined standards could be as humane and flexible as a jury in reflecting the changing standards of society."

mination of guilt or innocence" that underlies our national commitment to the jury system. See *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968). As the Court explained it only last Term in *Williams* v. *Florida,* 399 U.S. 78, 100 (1970),

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence.

This same philosophy animates the determination to commit the decision whether a convicted murderer should be executed to the "common sense judgment of a jury of his peers". *Baldwin* v. *New York,* 399 U.S. 66, 72 (1970). Jury discretion on capital punishment reflects the policy that the death penalty should represent the sanction of the community, acting through the community's surrogates in a particular case. The jury in a capital case is society in microcosm, deciding the fate of one of its members. Thus last term in *Williams* the Court expressly recognized that the fact that no State provides for less than twelve jurors in a capital case suggests that such a large body is "used as a means of legitimating society's decision to impose the death penalty". 399 U.S. at 103.

Criteria legislatively codified in advance are not a constitutionally necessary ingredient in this system. Any attempt to draw a parallel with our system's insistence on explicit and formal definition of elements of criminal conduct to guide the jury's guilt determi-

nation is insupportable. The fixing of a sentence is "different in kind from a finding that the defendant committed a specified criminal offense". *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n. 20 (1968). The former inquiry involves the adjudication whether the accused has done something for which he may be punished; historical practice and fundamental fairness demand that the accused have had advance warning of the precise contours of lawful behavior and also that the jury be advised exactly what it is the law has proscribed. Those are the dual policies protected by the constitutional prohibition against "vagueness" in substantive criminal statutes. But in the sentencing determination, the accused stands convicted of crime and the question is what course society should take with him. That decision inherently and emphatically calls for the making of an individuated value judgment—and our basic assumptions about the jury system impel the conclusion that it is fundamentally fair to let that critical decision be made, without more, by his assembled peers.

The fairness of this course seems all the more clear today, when courts, statutes, and the Constitution itself assure that it will be a fairly constituted jury of his peers that tries and sentences the accused. Now settled is the principle that the federal Constitution guarantees that jury lists must be drawn from a source that "reasonably reflects a cross section of the population suitable in character and intelligence for that civic duty". *Carter* v. *Jury Comm'n of Greene County,* 396 U.S. 320, 332–333 (1970). To assure compliance with this constitutional command in the situation

where in actuality it may be most crucial, this Court has reacted sternly to any serious possibility that Negroes are systematically excluded from grand or petit juries. See, *e.g.*, *Coleman* v. *Alabama*, 389 U.S. 22 (1967).

And in *Witherspoon* v. *Illinois*, *supra*, the Court pointed out that juries in capital cases today are "[g]uided by neither rule nor standard" and explained the essence of the jury's function in this type of case (391 U.S. at 519):

> a jury that must choose between life imprisonment and death can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.

It was because of the jury's role as representatives of society at large in a specific case that the Court held that the Constitution forbids deliberate exclusion from a capital jury of members of a substantial subgroup in our country—those with conscientious scruples about the death penalty. The precise reasoning is highly pertinent here (391 U.S. at 519):

> And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society". *Trop* v. *Dulles*, 356 U.S. 86, 101 (opinion of The Chief Justice, joined in

by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Whittaker).[48]

We need not dwell on the point that *Witherspoon* would be a superfluous exercise if it does not imply that jury sentencing discretion without "rule or standard" *is* compatible with the Due Process Clause *if* there is no conscious attempt to make the jury something less than a random cross-section of the community. Even apart from the inevitability of such an inference, we believe it is a legitimate policy for a State, like California or Ohio, to conclude that it should maximize the freedom of the individual jury to express the community's contemporary judgment on the severity of the penalty merited by a particular defendant. If it selects this policy a State, like California or Ohio, can rationally decide not to volunteer any abstract and sterile "criteria" that might incline the jury away from the death penalty or toward it.

C. JURIES CAN AND DO FUNCTION RATIONALLY WITHOUT EXPLICIT LEGISLATIVE STANDARDS ON CAPITAL SENTENCING

Implicit in the foregoing discussion is the basic assumption that the jury acts rationally in discharging its functions. Certainly this is necessarily assumed in connection with the jury's ascertainment of guilt. This Court has never impugned the validity of the assumption that, at least when screened from prejudicial pressures like legally inadmissible but

[48] On the evolving community attitude toward capital punishment, see *The Capital Punishment Controversy*, 60 J. Crim. L., Criminol. & Pol. Sci. 360 (1969).

"powerfully incriminating extrajudicial statements", [49] the jury can be trusted to decide the controversy reasonably, conscientiously, and intelligently. The Court has carefully warned that it would be "extravagant in the extreme" to take cases like *Jackson* v. *Denno*, 378 U.S. 368 (1964), "as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues * * *." *Spencer* v. *Texas*, 385 U.S. 554, 565 (1967). Later, in *Bruton* v. *United States, supra*, the Court expressly reaffirmed its view that, except in rare situations like the one there dealt with, "this reliance [on the jury's ability] is justified". 391 U.S. at 135.

Indeed, in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), in holding that the Sixth Amendment's guarantee of trial by jury in serious criminal cases applies to the States through the Fourteenth Amendment, the Court considered and repudiated many of the same allegations of jury irresponsibility and capriciousness that are explicit or implicit in the arguments of petitioners and the *amici* supporting them in the present cases (391 U.S. at 157):

> In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, *and that they are unpredictable, quixotic, and little better than a roll of dice.* Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the

[49] *Bruton* v. *United States*, 391 U.S. 123, 135 (1968); see, also, *Jackson* v. *Denno*, 378 U.S. 368 (1964).

> evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed. [Emphasis added.] [70]

The argument that "standardless" discretion allows the jury to fix a death sentence out of whim, ignorance, or bigotry proceeds in blind disregard for the actual mechanisms of jury room deliberations. That argument unfairly assumes that, on this most serious decision, twelve jurors who have been carefully screened by defense counsel will silently cast their ballots for their own private reasons without reference to or regard for the views of their fellow jurymen. On the contrary, we submit, as the records of the deliberations in the instant cases strongly suggest, even when the evidence of guilt is clear and overwhelming, capital jurors take the time to discuss and debate amongst themselves the reasons why the defendant should or should not be executed for his crime. It borders on the fatuous, in our view, to suspect that twelve "good men and true", carefully

---

[70] Citing Kalven & Zeisel, The American Jury (1966). We discuss the Kalven & Zeisel findings in this regard in more detail *infra*, pp. 70–73.

Nevertheless, despite these judicial reaffirmations and despite the factual evidence, there remain critics who insist that juries are so jaded by prejudice and caprice that even sentencing standards would be of no avail. See, *e.g.*, Goldberg & Dershowitz, *Declaring The Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1793–1794 (1970).

selected for their integrity and responsibility, will arrive at a capital verdict that is either thoughtless or capricious, rather than the expression of community consensus in microcosm."[71]

As the New Jersey Supreme Court recently stated:

> Here, the Legislature committed the decision upon punishment to twelve jurors, to be made upon and after a consideration of all the evidence. A reasoned judgment can be reached upon an appraisal of the total circumstances even though no one can articulate in advance a detailed list of conceivable factors or their relative weights."[72]

The hard evidence of the workings of our present system confirms in fact what has been repeatedly

---

[71] See *State* v. *Smith*, 74 Wash. 2d 744, 446 P. 2d 571, 590 (1969), pending on pet. for cert., No. 5034, O.T. 1970.

See also the testimony of Mr. Justice Frankfurter before the British Royal Commission on Capital Punishment in 1950, reprinted in Frankfurter, Of Law and Men, 82 (Elman ed. 1956), speaking of the jury in a capital case:

"On the whole, not only do they express a rough kind of popular feeling about conduct, but for the most part I think we can trust twelve people on a jury at least as well as judges as to motives, for judges are rather removed from everyday activities and on the whole are bound to be so by their calling."

Of course, to the extent the jurors may not agree on the same precise reason why the defendant should or should not receive a capital sentence, the situation is indistinguishable from the guilt determination where in agreeing on the ultimate question the individual jurors may have travelled different paths. Nevertheless, it is the arrival at consensus after deliberation that makes the verdict, whether on guilt or punishment, a fair and probably accurate determination.

[72] *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181, 194 (1968), pending on pet. for cert., No. 5011, O.T. 1970.

affirmed in theory: that juries do in concrete cases follow rational sentencing patterns without reference to any statutory criteria.

In the early 1950's, the British Royal Commission on Capital Punishment conducted an extensive canvass of the American approach to capital sentencing. We have already noted that the Commission concluded that "[n]o formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder", but that "[d]iscretionary judgment on the facts of each case is the only way in which they can be equitably distinguished." [73] The Commission then proceeded to recommend adoption of the American system of jury discretion.[74] This recommendation was made, however, only after the Commission was satisfied that the American experience had demonstrated that, even when the penalty decision is entrusted to the "unfettered discretion" of the jury, "they can be relied on to exercise it reasonably in all but exceptional cases." [75]

Other more recent studies confirm this assessment. Professors Harry Kalven Jr. and Hans Zeisel, in preparing their massive study, The American Jury (1966), analyzed in depth the workings of over 3,500

---

[73] Royal Commission on Capital Punishment 1949-1953, Report ¶ 595 (1953).

[74] *Ibid.*

[75] *Id.* ¶ 594. Mr. Justice Frankfurter had testified before the Commission: "May I say, with all respect, I do not understand the view that juries are not qualified to discriminate between situations calling for mitigated sentences." See Frankfurter, Of Law and Men 87 (Elman ed. 1956).

jury trials. Their ultimate conclusion was a reaffirmation of the practical reliability of the jury system. With remarkable regularity, they found, the *ad hoc* jury decides the case the way the experienced trial judge would have."[11] The authors posed three explanations to explain why the jury actually comes so close to deciding in accordance with abstract norms (p. 498):

> * * * [First], the official law has done pretty well in adjusting to the equities, and there is therefore no great gap between the official values and the popular. Again, the group nature of the jury decision will moderate and brake eccentric views. Lastly, the jury is not simply a corner gang picked from the street; it has been invested with a public task, brought under the influence of a judge, and put to work in solemn surroundings.

The final assessment of the jury's performance, in light of the empirical data, is this (*ibid.*):

> The jury thus represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity, and flexibility into a legal system.

The data on jury behavior in capital cases illustrate this rationality and judgment. The two types of situ-

[11] And to the extent there is disagreement, the jury is eight times more likely to opt in favor of the defendant than is the judge (p. 376), either because of its more stringent application of the reasonable-doubt standard or because of its recognition of particular "equities" not officially accommodated by the law. See, *e.g.*, pp. 107–116, 182–190, 300–305, 494–495.

ations that exist, one where judge and jury would agree on the death penalty, and the other where they would not, both seem to indicate that statutory "standards" would be superfluous. In the former case, where judge and jury agree that the death penalty should be imposed, it is because the obvious factors listed in the Model Penal Code as generally in "aggravation"[77] are actually present and are found to preponderate in favor of the death penalty. In those situations where there is disagreement—and in the event of disagreement the jury is found to be somewhat more lenient (p. 436)—there are present one or more of the rather obvious "mitigation" factors listed in the Code, such as provocation, emotional instability, mental abnormality, or mere vicarious participation in a killing actually committed by someone else (pp. 439–445).[78] The fact of disagreement in the face of the presence of such factors simply illustrates that a value-judgment must be made in weighing the significance of mitigating circumstances against aggravating circumstances. This evaluation is an inherent part of the jury's deliberation on penalty, and seems to be performed satisfactorily without external statutory enumeration. Certainly, it must be conceded

[77] Such factors include peculiar heinousness, multiple murder, concurrence with other vicious felony (pp. 437–439).

[78] The survey demonstrated that the "jury's sense of equity" emerged quite clearly in the felony-murder context where the jury tolerates the "rigidity" of that rule in fixing guilt, but "rebels at imposing the death penalty for the vicarious criminal responsibility of the defendant" who did not actually kill the victim (p. 443 & n. 18). This distinction was evidently drawn by the jury in the *McGautha* case now before the Court.

to be impossible to assign in advance some relative quantitative weight that various circumstances should be accorded in a particular case. Since this is so, and since juries do at present make their penalty determinations in light of "aggravating" and "mitigating" circumstances that become evident in the concrete case, we see utterly no factual basis for petitioners' argument that only the formulation of statutory "criteria" can supply fundamental rationality to the jury's sentencing decision.

The other major recent study of the workings of the modern jury system was conducted by the Stanford Law Review and focused on the precise question now before the Court: whether juries charged with the responsibility for fixing punishment in capital cases behave irrationally in the absence of statutory standards. See *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing,* 21 Stan. L. Rev. 1302 (1969). That survey considered all California cases in which first-degree murder verdicts were returned from 1958 through 1966, some 238 cases (pp. 1306, 1310). In order to make the study as informative and inquisitive as possible, the authors investigated and analyzed 178 separate variables that might have entered into the penalty decision in each case (see pp. 1317, and 1471–1476 [listing the variables]). The ultimate conclusion reached, apparently to the surprise and disappointment of the student editors, was that there *are* "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random", and that "[m]ore importantly, the discovery

of variables that by themselves affect the penalty decision clearly indicates standards of decisionmaking" even without explicit statutory criteria (p. 1419). On the key question whether the patterns actually revealed indicate that juries follow any irrational or illegal standards—like race—, the conclusion was a resounding No (pp. 1346, 1366–1367, 1417–1420). On the contrary, jurors under the present system do indeed follow patterns which "are rational in terms of, say, the *Model Penal Code*" (p. 1429).[79]

For instance, the Model Penal Code enumerates as

[79] The one asserted exception to this finding of rationality was the conclusion that juries appear to discriminate along *economic* lines, in that blue-collar murderers were somewhat more likely to receive the death penalty than white-collar murderers (p. 1419). This was the only "factual" basis to which the student authors could point as indicating that "standardless" sentencing should be abolished (pp. 1420, 1421, 1429, 1431). It is not clear how this conclusion can be reconciled with the authors' own recognition that a set of criteria like those in the Model Penal Code could not in any event preclude a bias-minded jury from making an unreviewable decision to "aggravate" or "mitigate" along impermissible lines (pp. 1422–1423).

However, the validity of even this *single* finding of irrationality was questioned by Prof. Harry Kalven Jr., who wrote the Preface for the student piece. On the basis of his years of experience with the American jury, Prof. Kalven commented:

"I am not persuaded that this is an expression of simple class bias and not a reflection of a more subtle concern with personality and character."

Professor Kalven further explained:

"I would suggest also that the authors risk being corrupted somewhat by their passion for turning their findings into constitutional arguments against the death penalty. It keeps them from being speculative enough about the mystery they are inquiring into."

Kalven, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Preface*, 21 Stan. L. Rev. 1297, 1300, 1301 (1969).

"aggravating circumstances" (see Section 210.6(3), App. G, *infra*, p. 144): a prior record of violent felonies; commission of more than one murder on the same occasion; and killing while resisting arrest or committing a forcible felony. Without the existence of a formal codification of such factors, juries exercising their innate common sense [80] recognized, assessed, and applied these factors in concrete cases. Thus, the most significant impact on whether the death penalty was selected came from whether the defendant had a prior felony record (pp. 1326–1327, 1389–1390, 1412). The incidence of the death penalty also varied directly with the number of victims actually killed or wounded (p. 1351, 1398). And a murder committed while resisting arrest was recognized as aggravated (pp. 1354–1355), as was a killing during the course of another felony, like kidnapping or rape (p. 1352, 1401).[81]

On the other hand, the Model Penal Code spells out as "mitigating circumstances" the lack of prior criminal history, the effect of extreme mental or emotional disturbance, vicarious participation in a killing committed by another, and diminished mental capacity. Here again, the jury required no such extrinsic enumeration to recognize the potential significance of such factors. Thus, the cleaner the defendant's prior record, the less likely he was to be condemned to death (pp. 1389–1390). So too, severe provocation or stress reduced the likelihood of the

[80] See *Baldwin* v. *New York*, 399 U.S. 66, 72 (1970).

[81] Notably, one factor that the Model Penal Code would point to as "aggravating"—exceptional bloodiness—is *not* assigned any such significance by juries under the present system (p. 1357).

death penalty (pp. 1404–1406, 1408). If the killing was actually committed by a co-participant in the crime, the jury was exceedingly unlikely to return a death verdict (pp. 1348, 1398). And the Code's concept of diminished responsibility was found to be reflected in practice by the reduced incidence of capital verdicts against murderers who had, for instance, consumed some alcohol before committing the crime (pp. 1357–1358, 1389).

The two cases now before the Court illustrate the accuracy of those findings of jury rationality even in the absence of extrinsic standards. When the jury refused to exercise its prerogative under Ohio law to recommend mercy for James Edward Crampton, it knew him to be a habitual criminal who had spent much of his adult life in prison, a man who had not benefited from prior confinement in prison or treatment in hospitals. Within the span of a few days prior to murdering his wife he had embarked on a one-man interstate crime wave demonstrating extraordinary disregard for the law. The crime itself was obviously cold-blooded murder, the culmination of months of threats and the product of a clear design to obtain and use a lethal weapon. The killing was completely unprovoked, while the victim was helpless. And on the other hand, the evidence failed to demonstrate anything in support of Crampton's insanity defense beyond a purely sociopathic condition—an antagonism to the norms of society.

Nor is there any more room to speculate that the 'standardless" sentencing of Dennis Councle McGautha was irrational. Rather, the jury seems to have

been eminently reasonable in drawing the distinction it did in fixing a life sentence for co-defendant Wilkinson and a death sentence for McGautha. In terms of all the aggravating and mitigating circumstances enumerated by the Model Penal Code and actually sensed and applied by modern juries, McGautha and his co-defendant stood poles apart. Perhaps most dramatic was the jury's persistent effort to determine which of the two men had actually fired the fatal shot. McGautha argues that this inquiry was "immaterial to the question of their legal responsibility for the crime charged".[82] Legally, of course, both men were guilty of felony-murder. But as the Model Penal Code suggests, and as the studies by Kalven and Zeisel and by the Stanford Law Review demonstrate, it does indeed make sense on the penalty question to treat a man who is *in fact* only a robber differently from one who is in law *and* in fact a killer.[83]

Thus, juries in general, as typified by the juries in the instant cases, do follow rational patterns in deliberating the fateful question of which murderers should die for their crimes and which should not. There is simply no factual basis for the argument that statutory standards are constitutionally necessary to insure the fairness of these deliberations.

---

[82] Brief for Petitioner McGautha, No. 203, p. 7.

[83] See, also, *People* v. *Hicks*, 287 N.Y. 165, 170, 38 N.E. 2d 482, 485 (1941) (the jury in a felony-murder case may tailor the penalties "to the varying degrees of moral guilt of the persons involved in the same crime").

D. THE PRESENT SYSTEM OF JURY DISCRETION IN CAPITAL SENTENCING DOES NOT VIOLATE ANY CONSTITUTIONALLY PROTECTED INTEREST OF AN ACCUSED

Petitioners' principal thrust is that "standardless" jury discretion in capital sentencing is fundamentally unfair because it allows juries to be arbitrary and capricious when left to their own devices. We have seen that this contention finds no support in law or in fact. But in the course of pressing the argument, petitioners refer to certain other "rights" which are allegedly infringed by the State's decision not to establish a set of statutory standards. These claims, however, rest on equally shaky foundations.

1. The argument is made that the absence of official, published standards deprives every person charged with a capital offense of notice of what factors are going to be considered in determining his punishment upon conviction. Such a contention proceeds on the assumption that defense counsel (and indeed the prosecutor) lack the same common sense that animates the jury, for it rather naively supposes that counsel cannot predict with some degree of reliability what factors in his case are likely to appeal to the jury he has helped to select (and thus should be stressed) and which are likely to offend it (and thus should be muted).

In any event, this "notice" point ignores the settled constitutional principle that when a pure question of sentencing is involved—including capital sentencing—the accused is not entitled to notice of the factors that will be considered, or to a hearing on their weight, or to an opportunity to litigate those factors

or others. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 245–246 (1949); *Williams* v. *Oklahoma*, 358 U.S. 576, 583–584 (1959).[84] In accordance with this settled rule, this Court and lower federal courts invariably agree that a defendant has no right to examine and litigate the pre-sentence report on which his sentence will be based.[85]

2. A second subordinate argument advanced in support of the need for statutory standards is that without such formally defined factors it is impossible to review the jury's penalty decision. This contention is doubly deficient. First, it begs the critical question whether the jury is constitutionally obliged to fix a penalty according to some set of pre-determined criteria. And second, and perhaps more basic, this position has as its major premise the notion that the Constitution guarantees a right of review of the jury's penalty verdict. This premise is demonstrably false. As was stated in *Williams* v. *Oklahoma City*, 395 U.S. 458, 459 (1969), this Court has "never held that the States are required to establish avenues of appel-

[84] The holding in *Williams* v. *New York* on this point was explicitly reaffirmed in *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967). Cf. *Solesbee* v. *Balkcom*, 339 U.S. 9, 12–13 (1950), holding that due process does not guarantee a person under sentence of death a right to an adversary hearing or an opportunity to present evidence in support of a request for executive clemency.

[85] See, *e.g.*, *Gregg* v. *United States*, 394 U.S. 489, 492 (1969); *United States* v. *Kee Ming Hsu*, 424 F. 2d 1286, 1291 & n. 1 (C.A. 2, 1970); *United States* v. *Chapman*, 420 F. 2d 925, 926 (C.A. 5, 1969); *United States* v. *Trigg*, 392 F. 2d 860, 864 (C.A. 7), certiorari denied, 391 U.S. 961 (1968); *United States* v. *Gross*, 416 F. 2d 1205 (C.A. 8, 1969), certiorari denied, 397 U.S. 1013 (1970); *Cook* v. *Willingham*, 400 F. 2d 885 (C.A. 10, 1968).

late review." See, also, *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Indeed, in *Andrews* v. *Schwartz*, 156 U.S. 272, 275 (1895), the Court specifically rejected the claim that due process should be held to guarantee a right of appeal in a capital case.

And even when appeals are allowed, there is no constitutional compulsion to broaden the scope of review to include the sentence. Few states currently authorize appellate review of sentences.[86] Similarly, in the federal system, this Court and the lower federal courts have long expressed inability, in the absence of specific statutory authority, to review a sentence that is within the maximum limits fixed by law. See, *e.g.*, *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Scott* v. *United States*, 419 F. 2d 264, 266 n. 2 (C.A.D.C. 1969).[87]

It would seem to follow then that the Constitution cannot be said to require the formulation of standards for capital sentencing in order to facilitate review of the sentencing determination when the Constitution does not require the review itself and most jurisdictions do not authorize it. Even where review by the trial judge or by an appellate court is author-

[86] See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 25 (1967).

[87] See, also, Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405, 411 (1968).

The National Commission on Reform of Federal Criminal Laws, in its Study Draft of a New Federal Criminal Code (1970), proposes amending 28 U.S.C. § 1291 to authorize courts of appeals to review, reduce, or set aside a criminal sentence (p. 311).

ized, we can perceive no reason why the election to permit that review must carry with it the enumeration of criteria to which the primary sentencing authority is to look. Indeed, where review is allowed it may be more desirable to avoid the formulation of sentencing standards; such standards might tend to discourage the reviewing court from exercising independent discretion if it found "some" evidence in support of one or more "aggravating circumstances"—almost an inevitable situation in a first degree murder case.[88] Thus, even if it opts to permit review of the death sentence, the State has a legitimate interest in not attempting to codify sentencing considerations.

3. Finally, there are some cryptic references to the Equal Protection Clause as a constitutional basis for requiring standards. We have already seen that juries do, without statutory standards, follow general patterns in considering certain types of circumstances as normally of an aggravating nature and others as of a generally mitigating tone. It is true that a person convicted of a first-degree murder that appears to be similar to the crime committed by another person may receive the death penalty while the other person is sentenced to life imprisonment, or *vice versa*. At most this indicates that different juries—or judges—may assess similar factors differently or accord them different relative weight. This occasional disparity is inherent in any system that depends on hu-

[88] The Appendix to California's Respondent's Brief in the *McGautha* case, No. 203, shows that every death case before the California Supreme Court in the past five years involved at least one "aggravating circumstance." Compare *State* v. *Maloney*, 105 Ariz. 348, 464 P. 2d 793, 805 (1970), reducing a death sentence to

man judgments in administering the law, and there is little reason to suppose that the addition of statutory standards to the equation could or would affect the assessment in a particular case. But apart from that, the similarity of *certain* circumstances surrounding two murders may mask the existence of substantial diffences either in other aspects of the crime or in the respective defendants' backgrounds. No principle of equal protection of the laws is offended by imposing different sentences in such a context. Different punishments for the "same offense" can constitutionally be justified on the basis of the inevitable distinguishing circumstances. It is certainly true that no two murders and no two murderers are the same, and the Equal Protection Clause can not require that they be treated identically.[29] There can be no invidious discrimination or denial of equal protection when the sentencing "result may depend upon a particular combination of infinite variables peculiar to each individual trial." *North Carolina* v. *Pearce,* 395 U.S. 711, 722 (1969). There is no logical, legal, or factual nexus between "standardless" sentencing under a statute neutral on its face and any denial of equal protection. As with all other constitutional challenges proposed by petitioners against the present sentencing system, this one too must fail.

---

life imprisonment in accordance with statutory authority to do so when the court finds that "the punishment imposed is greater than under the circumstances of the case ought to be inflicted."

[29] See *Howard* v. *Fleming*, 191 U.S. 126, 135 (1903); *Stephens* v. *Turner*, 421 F. 2d 290, 292 (C.A. 10, 1970). Cf. *Johnson* v. *United States*, 225 U.S. 405, 417 (1912): "There is certainly nothing anomalous about punishing the crime of murder differently in different jurisdictions."

II

NEITHER THE PRIVILEGE AGAINST SELF-INCRIMINATION NOR THE DUE PROCESS CLAUSE REQUIRES SEPARATE TRIALS ON THE ISSUES OF GUILT AND PUNISHMENT IN EVERY CAPITAL CASE

Petitioner James Edward Crampton raises an additional constitutional contention in attacking his death sentence. He contends that Section 2901.01 of the Ohio Revised Code under which he was tried and convicted of first-degree murder impermissibly impinged upon his privilege against self-incrimination. Under that statute the jury determining guilt simultaneously has the responsibility for deciding whether, upon conviction, the accused's punishment should be reduced to life imprisonment in lieu of the death penalty that otherwise automatically attaches. The essence of petitioner's contention is that this statutory scheme confronts an accused with an unreasonable dilemma: he must either waive his privilege against self-incrimination by testifying before the jury prior to its determination of his guilt or he must forego an opportunity to explain why, if convicted, he should receive mercy.[90]

Petitioner casts his argument in favor of a constitutional requirement of bifurcated trials in capital cases solely in terms of protecting the privilege against self-incrimination.[91] The *amici curiae* supporting the same objective, however, expand the purported constitutional basis for it by also relying on

[90] Since California provides for separate trials on the guilt and punishment questions, the bifurcation issue does not arise in the *McGautha* case, No. 203.

[91] See Brief for Petitioner Crampton, No. 204, pp. 9–19.

the requirements of fundamental fairness under the Due Process Clause."[22] It is the view of the United States that neither of these constitutional principles compels the adoption of bifurcated trials in capital cases or invalidates a death sentence imposed after an otherwise fair unitary trial.

A. THE UNITARY TRIAL IS THE ESTABLISHED AND APPROVED MODE FOR EVEN COMPLEX CRIMINAL CASES

We preface our discussions of the precise constitutional issues presented with a brief review of the place of the bifurcated trial in our jurisprudence.

It is easy to conceive of a variety of criminal prosecutions where a number of complex issues arise and where the accused may wish to be able to present defenses in addition to and sometimes inconsistent with a bare "not-guilty" stance. Frequently such defenses are also inconsistent with each other. Hence, it might be to the defendant's tactical advantage to have the trial subdivided, so that the jury could pass upon his alibi defense, for instance, before he falls back on a claim of self-defense or insanity. In no situation heretofore, however, has an accused been able to show a constitutional basis for imposing his preference.

As this Court noted not long ago in *Spencer* v. *Texas,* 385 U.S. 554, 568 (1967): "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." In *Spencer* the accused unsuccessfully sought a ruling that the Due Process Clause invalidated a Texas

[22] See Brief *Amici Curiae* of the NAACP et al., Nos. 203 and 204, pp. 72–74 and Appendix pp. 66–78.

statute that authorized the introduction of prior-crimes evidence at a one-stage criminal trial in order to enable the jury, in fixing punishment, to set an enhanced punishment for recidivism. Rejecting the argument that fundamental fairness required a bifurcated proceeding to prevent the jury from confusing the issues of guilt and punishment the Court upheld Spencer's conviction and the sentence of death fixed by the jury.

Demands for bifurcation have also arisen with some frequency in cases where the accused seeks to present an insanity defense—as in Crampton's case now before the Court. In such situations, too, the lower courts have dismissed assertions that the Constitution requires separate trials, despite recognition that the insanity defense might be "collaterally inconsistent with other defenses"; this conclusion has been reached even where the denial of bifurcation led the defendant to abandon the insanity claim in order to preserve his privilege against self-incrimination.[13] Even in first-degree murder cases the possibility of overlapping inconsistency between a claim of insanity and either a general plea of not guilty or such other affirmative defenses as alibi, self-defense, or lack of premeditation, has not created a constitutional right to split proceedings.[14]

These cases reflect the thesis, firmly established in

[13] See *United States* v. *Huff*, 409 F. 2d 1225, 1228 (C.A. 5), certiorari denied, 396 U.S. 857 (1969). See, also, *Bell* v. *Patterson*, 402 F. 2d 394, 399 (C.A. 10, 1968), affirming 279 F. Supp. 760, 767 (D. Colo. 1968).

[14] See, *e.g.*, *Contee* v. *United States*, 410 F. 2d 249 (C.A.D.C. 1969); *Parman* v. *United States*, 399 F. 2d 559, 562 (C.A.D.C.) (Burger, J.), certiorari denied, 393 U.S. 858 (1968).

our criminal law, that the integrity of a criminal trial should not be sacrificed by carving it into a two- or three-act play with the jury returning after each intermission to announce whether the parties should proceed to develop the next issue."[88]

This historical conception of the essentially unitary nature of the criminal trial, coupled with the State's "valid and substantial interest in expeditiously prosecuting offenses', has generally served to sustain the propriety of adhering to such a procedure, notwithstanding the potential complication of the accused's position."[89] In *Spencer* v. *Texas, supra,* this Court held that the State's interest in utilizing a unitary trial for complete disposition of all questions to be decided by the jury was sufficient for due-process purposes even though there was some possibility of "collateral prejudice" (385 U.S. at 563–564) and even though a two-stage trial might have been *more* fair to the accused (385 U.S. at 567–568):

---

[88] Historically, in civil trials there has been greater resort to separate determinations of divisible issues. Significantly, while Rule 42(b of the Federal Rules of Civil Procedure explicitly authorizes severance of separable claims *or issues* for separate trials, itsanalogue in the Federal Rules of Criminal Procedure, Rule 14, authorizes only "separate trials of counts".

California, by contrast, provides by statute for a *three*-stage jury trial in a capital case, where a plea of not guilty by reason of insanity is raised. First, guilt is to be tried, then sanity, and finally penalty. See Cal. Penal Code §§ 190.1, 1026.

[89] See, *e.g.*, *United States* v. *Huff*, 409 F. 2d 1225, 1228 (C.A. 5, 1969); *Bell* v. *Patterson*, 279 F. Supp. 760, 767 (D. Colo.), affirmed, 402 F. 2d 394 (C.A. 10, 1968).

> To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context [[*]], is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. [Court's footnote omitted.] [**]

In the present case petitioner challenges a statute authorizing the jury in a capital case to fix punishment at the time it returns its verdict on guilt. This attack has been made often in the past and has met with uniform rejection by the lower federal and state courts.[**] As far as we are aware, no court has ever held a statute of this type unconstitutional on its face, and none has reversed a conviction and death sentence imposed under such a statute because of the

---

[*] But see Rule 14, Fed. R. Crim. P., which does not authorize separate trials of discrete issues in federal criminal cases.

[**] Compare *United States* v. *Jackson*, 390 U.S. 570 (1968), where in order to *avoid* placing an impermissible burden on the right to a jury trial the *government* argued that the Federal Kidnapping Act should be construed to provide for separate trials on the guilt and capital punishment questions. Noting that such bifurcation would be "a procedure unique in the federal system" (390 U.S. at 576), the Court declined to "give the statute this strangely bifurcated meaning***" (390 U.S. at 578). See, also, App. E. *infra*, p. 138.

[**] See, *e.g.*, *United States* v. *Curry*, 358 F. 2d 904, 913–916 (C.A. 2), cert. den., 385 U.S. 873 (1966); *United States ex rel. Thompson* v. *Price*, 258 F. 2d 918, 921–922 (C.A. 3), cert. den., 358 U.S. 922 (1958); *Maxwell* v. *Bishop*, 398 F. 2d 138 (C.A. 8, 1968), vacated on other grounds, 398 U.S. 262 (1970); *Segura* v. *Patterson*, 402 F. 2d 249, 253–254 (C.A. 10, 1968); *Bell* v.

failure of the trial judge, on motion or *sua sponte*, to order a bifurcated trial.[1]

On the legislative side, proposals for bifurcation in capital cases[2] have met with somewhat more re-

---

Patterson, 279 F. Supp. 760 (D. Colo.), affirmed, 402 F. 2d 394 (C.A. 10, 1968); *Mathis* v. *State*, 283 Ala. 308, 216 So. 2d 286, 287–288 (1968); *People ex rel. McKevitt* v. *District Court* — Colo. —, 447 P. 2d 205, 207–208 (1968); *Jackson* v. *State*, 225 Ga. 790, 171 S.E. 2d 501, 504 (1969); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181, 194–195, pending on pet. for cert., No. 5011, O.T. 1970; *State* v. *Kelbach*, 23 Utah 2d 231, 461 P. 2d 297, 299 (1969); *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E. 2d 725, 730–731, pet. for cert. dismissed, 396 U.S. 801 (1969).

Some federal courts have suggested that the bifurcation question should be resolved on a case-by-case basis, and that trial judges possess discretion to grant such requests whenever substantial justice would be served. See *United States* v. *Curry*, *supra*, 358 F. 2d at 916; *Pope* v. *United States*, 372 F. 2d 710, 730 (C.A. 8, 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); *Frady* v. *United States*, 348 F. 2d 84, 91–92 (C.A.D.C.) (opinion of McGowan, J.) certiorari denied, 382 U.S. 909 (1965); cf. *Holmes* v. *United States*, 363 F. 2d 281, 283 (C.A.D.C. 1966) (insanity issue). See also the immediately following footnote.

Compare *United States ex rel. Scoleri* v. *Banmiller*, 310 F. 2d 720, 725, 736 (C.A. 3, 1962), certiorari denied, 374 U.S. 828 (1963), where on the particular facts the court held that due process had been violated by the introduction in a Pennsylvania capital case of evidence of twenty-five prior armed robbery convictions, despite an instruction that the jury was to consider them only on the question of punishment.

[1] The record indicates that petitioner did not request a separate hearing either on his insanity defense or on a request for mercy until the case was in the Ohio appellate courts. See C.A. 1–3 and Brief for Petitioner Crampton, No. 204, pp. 6–7.

[2] See, *e.g.*, Great Britain, Royal Commission on Capital Punishment, 1949–1953, Report ¶¶ 555–564 (1953); ALI, Model Penal Code § 201.6 (Tent. Draft No. 9, 1959); *id.* § 210.6 (Proposed Official Draft 1962) [App. G, *infra*, pp. 141–145.]; National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3604 (1970) [App. G, *infra*, 147].

ceptivity than have the proposals for statutory sentencing "criteria" as discussed above. At present, however, thirty-three of the thirty-nine States that retain a discretionary death penalty for murder and give the jury a voice in whether that penalty will actually be pronounced, adhere to the traditional procedure whereby the jury makes its decision as part of the single proceeding at which guilt is in issue.[3] The District of Columbia murder statute and the various federal homicide statutes also prescribe a unitary proceeding for determination of both questions.[4] The remaining six States with a discretionary death penalty recently enacted statutes to provide for a separate post-conviction hearing on the penalty question. California in 1957 was the first State to adopt such a procedure; Pennsylvania followed in 1959, as did Connecticut and New York in 1963, Texas in 1965, and Georgia on March 27, 1970.[5]

On the other hand, several States that enacted new criminal codes during this same period chose not to authorize splitting the jury's guilt and punishment determinations into a two-stage exercise.[6] Still other States in the interim have amended their murder statutes and by-passed the opportunity to abandon the

[3] See statutes listed in Appendix C, *infra*, pp. 132–135.

[4] See District of Columbia statute in Appendix C, *infra*, p. 133, and federal statutes in Appendix E, *infra*, pp. 138–139.

[5] See Appendix D, *infra*, pp. 136–137, citing and discussing these statutes.

[6] See, for instance, the Illinois Criminal Code of 1961 and the Kansas Criminal Code of 1969, cited in App. C, *infra* p. 133.

traditional single-trial system for capital cases.[7] And in 1962 when Congress amended the District of Columbia murder statute to allow juries discretion to recommend life sentences, it deliberately declined to adopt the California—Model Penal Code bifurcated procedure.[8]

Thus, although there has been a discernible trend toward legislative adoption of the two-stage trial in death cases, the equally evident reluctance of other legislatures to follow suit suggests that bifurcation may be a mixed blessing. Indeed, some of the reasons we shall discuss (in section C below) in explaining why we do not consider statutory bifurcation constitutionally compelled also indicate that the accused may get a fairer shake in a unitary trial.

B. A STATUTE ALLOWING THE JURY IN A CAPITAL CASE TO FIX PUNISHMENT AS PART OF A SINGLE-STAGE GUILT TRIAL DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioner's constitutional argument against the procedure whereby the jury decides whether to recommend mercy without any further proceedings directed exclusively toward that question is that this procedure impermissibly creates a tension between two constitutional rights: "his Fifth and Fourteenth Amendments right against self-incrimination * * * and his Four-

[7] See, *e.g.*, the 1969 amendments by Nebraska and New Mexico, described in Appendix C, *infra*, p. 134.

[8] See *Frady* v. *United States*, 348 F. 2d 84, 114–115 (C.A.D.C.) (opinion of Burger, J.), certiorari denied, 382 U.S. 909 (1965); see, also, *Coleman* v. *United States*, 334 F. 2d 558, 563, (C.A.D.C. 1964).

teenth Amendment right 'to be heard * * * and to offer evidence of his own'."[9]

The surface attraction of this argument, however, is not matched by any underlying support in constitutional principle or in practical reality. First, as we shall attempt to show, it is doubtful that there is a tension between two constitutional rights here, since the alternative "right" to which petitioner points is apparently the opportunity to offer his own personal testimony on the single issue of punishment without having any of this testimony, directly or through cross-examination, carry over into the consideration of guilt. We are unable to discover the constitutional source for this purported "right". Second, there is little factual basis for an argument that the accused's election to rely on his privilege against self-incrimination compels him to forego an opportunity to present evidence bearing on the question of punishment, since—just as with the guilt issue—a defendant exercising his constitutional option reserves the ability to make his case through *other* witnesses and evidence. And third, to the extent the unitary trial procedure may be said to occasion a hard choice between standing on the constitutional privilege or testifying personally, the procedure does not unconstitutionally burden his options or "compel" a waiver.

1. A defendant has no constitutional right to offer his personal gation evidence through witnesses other than himself.

Petitioner's constitutional argument depends first on the existence of an alleged dilemma: a "bruising

[9] Brief for Petitioner Crampton, No. 204, p. 7.

antagonism" forcing him to choose between two constitutional rights, "the right to speak to his sentencer or the right to remain silent."[10] One traditional way of resolving an apparent dilemma is, of course, to determine whether each of the "horns" has been correctly perceived, for it sometimes happens that an erroneous definition of the alternatives clouds the true dimension of the choice involved. Here, one horn is indeed the privilege against self-incrimination, which allows a defendant charged with a crime to decline to testify before the jury trying his case. What is doubtful is the nature of the other horn, "the right to speak to his sentencer". Necessarily, if petitioner

[10] Brief for Petitioner Crampton, No. 204, pp. 13-14. Throughout his argument in support of bifurcation, petitioner intertwines references to the alleged complication presented by his use of the insanity defense, because of the "risk that the medical evidence of his mental condition will disclose data prejudicial on the issues of guilt and punishment * * *" (Brief p. 18). We note first that this argument looks toward constitutionally compelled *trifurcation* of the trial into guilt, sanity, and punishment stages. On the possibility of guilt-sanity overlap there is no reason to treat the one-stage trial as inherently and unfairly causing the jury to confuse the two issues. See *Spencer* v. *Texas*, *supra*, 385 U.S. at 565; *Bruton* v. *United States*, *supra*, 391 U.S. at 135. On the possibility of sanity-punishment overlap, we fail to understand the point since even under a bifurcated (or trifurcated) procedure the punishment decision would have to follow the determination of sanity. Even if it be assumed that insanity testimony would bring out embarrassing facts that would not in any event come out at a penalty hearing, that risk is inherent in the nature of the insanity defense and is in no way enhanced by a procedure that authorizes the jury to determine punishment as part of the same hearing—unless a new, and thus insulated jury is to be empaneled solely for the penalty determination. There may be a real strategic problem for the defense in attempting an insanity defense but it is not relevant to the issue whether the Constitution requires a separate trial on penalty.

is to have any complaint about being *impermissibly* forced to choose between two constitutional rights, this second right must *otherwise* be exercisable compatibly with the privilege against self-incrimination—the right to remain silent. Thus, what must be meant by the alleged constitutional right to "speak to his sentencer" is a right to participate in the sentencing process by offering personal testimony confined to that question and immunized from impact on the issue of guilt. So understood, this second alleged constitutional right turns out to be merely the creation of attractive rhetoric, for this Court has never held either that a defendant has a constitutional right to establish sentencing factors or that he has a right to control the scope and impact of the testimony he may elect to give.

It is well settled that an accused does *not* have a distinct constitutional right to address himself to the sentencing authority. Whatever may be the present right of a defendant to testify in his own behalf on whether he is guilty of the charge,[11] the historical difference between guilt trials and sentence determinations has thus far denied an accused any such right at the sentencing stage. This distinction is at the heart of cases like *Williams* v. *New York,* 337 U.S. 241 (1949), and *Williams* v. *Oklahoma,* 358 U.S. 576 (1959), which hold that even in a capital case due process does not guarantee the accused an opportunity to litigate the factors which should be considered in passing sentence. Any contrary reliance on *Specht* v. *Patterson,* 386 U.S. 605 (1967), is misplaced. There, the

[11] Compare *Ferguson* v. *Georgia,* 365 U.S. 570 (1961), with *id.* at 602 (Clark and Frankfurter, JJ., concurring).

Court defined the holding of *Williams* v. *New York* as follows (386 U.S. at 606):

> We held in *Williams* v. *New York*, 337 U.S. 241, that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings *and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed.* [Emphasis added.]

As thus restated the Court expressly stated in *Specht* (386 U.S. at 608): "We adhere to *Williams* v. *New York, supra,*" declining only to extend that principle to preclude an opportunity for notice and hearing in the radically different situation where a Sex Offenders Act authorized different and more drastic dispositions only if additional findings of fact were made about circumstances *beyond* those at issue in the guilt trial.

There are repeated references in the briefs of petitioner and of the *amici* supporting him to the "right of allocution". It is a gross mischaracterization to press that "right" as the coded equivalent of a constitutional right to "speak" to the sentencer with palliating explanations why sentencing discretion should be exercised in the defendant's favor. The right of allocution developed at common law to give a defendant convicted of a capital offense—where traditionally the judge had no sentencing discretion—an opportunity to state why judgment should not be passed, "thus giving him an opportunity to allege any ground of arrest, or to plead a pardon, if he had obtained one, or to urge any other legal objection to further proceedings against him." *Schwab* v. *Berg-*

gren, 143 U.S. 442, 446–447 (1892). That opportunity has generally been carried forward by statute [12] or by court rule.[13] Indeed petitioner did avail himself of this opportunity under the Ohio statute,[14] but his statements "did not show sufficient cause why his sentence should not be pronounced" (C.A. 2–3). Furthermore, even as thus properly and narrowly understood, the "right of allocution" does *not* rise to the level of a constitutional right and its denial is not a "fundamental defect". This Court so held in *Hill* v. *United States*, 368 U.S. 424, 428 (1962).

Thus, having no constitutional right to allocution, or to "speak" to his sentencer, petitioner could not, as he argues, have suffered the imposition of an impermissible burden on the assertion of a constitutional right.[15]

But, of course, the State of Ohio did not in any sense attempt to prevent petitioner from "speaking to his sentencer", if he wanted to testify before the jury that was to decide his sentence. The real question is whether he can point to any constitutional privilege allowing him to confine his testimony solely to a single issue—punishment—and also to avoid the normal consequence

---

[12] See, *e.g.*, Ohio Rev. Code § 2947.05: "Before sentencing is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him."

[13] See, *e.g.*, Rule 32(a), Fed. R. Crim. P.

[14] See Brief for Petitioner Crampton, Appendix, pp. 33–35.

[15] See *Segura* v. *Patterson*, 402 F. 2d 249, 252–253 (C.A. 10, 1968); *People ex rel. McKevitt* v. *District Court*, —Colo. —, 447 P. 2d 205, 208 (1968); *State* v. *Kelbach*, 23 Utah 2d 231, 461 P. 2d 297, 299 (1969).

of testifying that he thereby "subjects himself to cross-examination and impeachment."[16] The answer is surely negative. Certainly, the privilege against self-incrimination does not empower an accused to enforce his preference about the selective subject and significance of his testimony by directing the jury not to assess his testimony in connection with the other issues in the case or by forbidding the prosecution to elucidate damaging information from him. Ever since the advent of statutes waiving the common law incompetence of a criminal defendant to testify in his own behalf,[17] it has been settled that a defendant who elects to testify can be cross-examined in full. See *Brown* v. *Walker,* 161 U.S. 591, 597–598 (1896). In *Raffel* v. *United States,* 271 U.S. 494 (1926), Justice Stone, speaking for the Court, explained the constitutional significance of a defendant's decision to testify:

> When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to facts in issue. (p. 497)
>
> * * * * *
>
> His waiver [of the privilege against self-incrimination] is not partial; having once cast aside the cloak of immunity he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing. (*ibid.*).
>
> * * * * *
>
> The safeguards against self-incrimination are

[16] Brief for Petitioner Crampton, No. 204, p. 18.

[17] See, generally, *Ferguson* v. *Georgia,* 365 U.S. 570, 575–583 (1961).

> for the benefit of those who do not wish to become witnesses on their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. (p. 499).

Thus, subject only to the usual rules limiting the scope of cross-examination, a defendant in a criminal trial cannot decide to testify in support of a particular defense he wishes to make and then assert the privilege against self-incrimination either to direct the jury not to consider his testimony as bearing on other parts of the whole case or to preclude the prosecution from discrediting that testimony. A defendant charged with first-degree murder may be able to construct a series of defenses to the charge: one simply challenging the sufficiency of the State's case; a second affirmatively alleging alibi; a third claiming self-defense; a fourth averring provocation or a lack of premeditation; and a fifth asserting insanity. Testimony from the accused on any of these latter four defenses may undercut the general denial, either through what he must disclose as part of his story or through concessions on cross-examination. And testimony on any of the four affirmative defenses raises the same practical problem that petitioner complains of here, namely, the risk that the jury will (quite logically, we think) conclude that the various theories are mutually inconsistent. Yet, the defendant in such a situation has not heretofore been allowed to invoke the privilege against self-incrimination to compel separate trials of each defense or even to prevent the

jury from concluding that his testimony in support of alleged provocation, for example, actually indicates premeditation. Similarly, the accused cannot jump back behind that privilege when, in the course of cross-examining on alibi testimony, the prosecutor seeks to elicit a concession of motive or an admission of presence at the scene of the crime.[18]

There seems to be little reason in constitutional principle to allow a defendant who wants to speak only on the question of sentence any more right to constrict the breadth of his testimony and the jury's consideration of it than is allowed to a defendant who wants only to testify on a specific element of guilt or defense. In neither situation is it sufficient to say, as petitioner earnestly argues in pressing his particular claim, that the State *could* sever the trial into separate hearings on discrete issues. (Brief pp. 14–15). The State *may* do so, but there is no basis for asserting that the privilege against self-incrimination requires it to do so.[19]

The foregoing discussion demonstrates, we believe, that the "right" petitioner claims he was unconstitutionally compelled to forego in order to assert his privilege against self-incrimination is no more than an imaginative construct. Since this is so, cases like *Simmons* v. *United States,* 390 U.S. 377 (1968), which

[18] See, generally, *Brown* v. *United States*, 356 U.S. 148, 154–156 (1958).

[19] Cf. *Spencer* v. *Texas*, *supra*, 385 U.S. at 567–568: "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest [procedure] * * * is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment."

condemned a practice that forced an unnecessary election between *two* constitutional rights (see 390 U.S. at 393–394), are not really apposite.

2. The defendant in a unitary capital trial can present mitigation evidence through witnesses other than himself.

The *Simmons* case, *supra,* is doubly distinguishable because in that case the only practical way for the defendant to assert his Fourth Amendment claim was by testifying *himself* at a suppression hearing, since that is customarily necessary to establish personal standing to object to a search and seizure. It was in that context that the Court held that he was entitled to rely on his privilege against self-incrimination to exclude his testimony from being used against him at his trial on the merits. In the present case, however, petitioner was not forced to choose between his privilege to remain silent and any right, assumed *arguendo,* to advance his views on the punishment question.[20] As a number of courts have noted in rejecting the very argument tendered by petitioner, whatever evidence would be admissible on the punishment question through petitioner's testimony could be presented through other witnesses instead.[21] Indeed, in rejecting

[20] Even if that were the situation, it would not *impermissibly* burden the exercise of his constitutional rights if the dilemma resulted from the ordinary and inherent vicissitudes of the criminal process. Thus, the weight of the State's case and the unavailability of other witnesses may as a practical matter "compel" the defendant to testify, but such inherent presures do not render the dilemma unconstitutional. See *Harrison* v. *United States*, 392 U.S. 219, 222 (1968).

[21] See *e.g.*, *Segura* v. *Patterson*, 402 F. 2d 249, 253 (C.A. 10, 1968); *Bell* v. *Patterson*, 279 F. Supp. 760, 765–766 (D. Colo.), affirmed, 402 F. 2d 394 (C.A. 10, 1968); *People ex rel. Mc-*

petitioner's arguments the court below specifically noted that he was able to present mitigation evidence through witnesses other than himself and that petition availed himself of this opportunity.[22]

Nor can it be said that conjoining the determination of guilt and capital punishment in one trial creates any inherent pressure for the defendant to testify. The constitutional protection of the defendant's right to summon *other* favorable witnesses[23] relieves any such pressures. And it is demonstrable that defendants do indeed call family, friends, or character witnesses more often in murder cases than

---

Kevitt v. *District Court*, — Colo. — 447 P. 2d 205, 208 (1968); cf. *Petition of Ernst*, 294 F. 2d 556, 561 (C.A. 3), cert. den., 368 U.S. 917. Most American jurisdictions allow the introduction of evidence directed solely toward mitigation of punishment in capital cases. See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1116 (1953).

If a State chooses not to allow any evidence to be introduced on the question of aggravating or mitigating the penalty, and thus if the jury is to determine punishment solely in light of evidence of the circumstances surrounding the crime, as petitioner argues is the rule in Ohio (Brief pp. 9–10)—and if such a practice is permissible under the Constitution, as we argue below—then it would seem to follow *a fortiori* that the State is not constitutionally compelled to afford a separate trial on the penalty question.

Recognizing the inevitability of this conclusion, the *amici* supporting petitioner take considerable pains to distinguish the case on which he relies for this proposition, *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935), and to demonstrate to the contrary that Ohio does allow the introduction of mitigation evidence. See Brief *Amici Curiae* of NAACP et al., Nos. 203 & 204, pp. 72–74.

[22] C.A. 86–87 (18 Ohio St. 182, 248 N.E. 2d 614, 617).

[23] Compare *Washington* v. *Texas*, 388 U.S. 14, 23 (1967), with *Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

in non-capital cases.[24] Moreover, the available data suggest that a defendant in a murder case is neither induced to testify nor discouraged from doing so by reason of the fact that the jury will simultaneously decide guilt and punishment.[25] The decision whether the accused will personally take the stand is based on a multitude of strategic considerations, and the unitary nature of the trial does not seem to be a significant ingredient.

Thus, there is still a further reason for declining to hold that the unitary trial *inherently* impinges upon the privilege against self-incrimination, since this premise is not supported by any theoretical likelihood of induced waiver or by any indication that the procedure actually induces waiver of the privilege. And in the present case, where petitioner did not request bifurcation at the trial court level and did in fact elect to stand on his constitutional privilege he certainly cannot be heard to argue that the unitary trial impermissibly "chills" the assertion of the privilege against self-incrimination. Nor on the other hand has petitioner pointed to any peculiar information which he alone could have presented *and* to which he would have testified at a bifurcated proceeding. It seems therefore that the unitary nature of petitioner's trial had no significant impact at all on his decision whether to testify in his own behalf.

---

[24] See Kalven & Zeisel, The American Jury 143 (1966).

[25] See Kalven & Zeisel, *supra*, at 143–148.

3. The unitary trial procedure does not impermissibly burden the exercise of the privilege not to testify.

Finally, even if the Court adopts petitioner's conception of the "bruising antagonism" that confronted him—a choice between his privilege against self-incrimination and his "right" to speak to his sentencer, the fact that he had to make such an election does not establish the desired constitutional infirmity in the unitary proceeding.

Any foundation for the final leg of petitioner's argument that the choice that confronted him (however it may be defined) unconstitutionally impaled him on the horns of a dilemma was decisively washed away by the Court's guilty-plea trilogy last Term. See *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); and *Parker* v. *North Carolina,* 397 U.S. 790 (1970). In *Brady* and *Parker* the defendants alleged that their decisions to plead guilty, and thus to waive their constitutional rights to avoid self-incrimination and to demand jury trials, were unconstitutionally induced by the fear of the death penalty, which could only have been imposed after jury trials. This Court affirmed the convictions. The rationale realistically took account of the accused's inherent need to make tactical judgments about his conduct of a criminal proceeding against him. The innate complexity of a criminal litigation generates a cross-current of pressures, including some that induce defendants to plead guilty in the hope or expectation that the consequences of such a course will be preferable to the result risked upon trial. The constitutional touchstone, the Court

ruled, is simply one of voluntariness, traditionally considered: was the accused "with the help of counsel rationally [able to] weigh the advantages of going to trial against the advantages of pleading guilty." *Brady* v. *United States, supra,* 397 U.S. at 750. That the assessment made later turns out to have been unwise does not vitiate the constitutionality of the election. As the Court explained in *Brady* (397 U.S. at 756–757):

> Often the decision to plead guilty is influenced by imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

In *McMann* v. *Richardson supra,* three defendants who had pleaded guilty to charges of robbery and murder contended that their pleas had been induced by the fear that the State would be able to introduce confessions they argued had been involuntarily procured from them. This Court vacated orders of the court of appeals which had ordered hearings on the claims; the Court held that the allegations that counseled defendants had entered guilty pleas because of

the existence of allegedly coerced confessions, when they would otherwise have put the State to its proof, did not make out a claim for relief even if true. As the Court explained (397 U.S. at 769):

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. * * * In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? * * *

It seems clear to us that similar reasoning demands rejection of petitioner's argument in the present case. Guided by eminent appointed counsel, the choice that confronted him was whether, on balance, it was strategically desirable for him to testify. Evaluation of that option had to depend on many of factors like the weight of the State's case, the quality of the expert psychiatric testimony, the probable impact of the testimony of petitioner's mother, the availability of other witnesses, the relative significance of petitioner's potential testimony, the jury's likely attitude toward the death penalty, and anticipation of petitioner's impression as a witness. There is no basis for concluding that the one additional factor in the calculus on which petitioner focuses—the jury's responsibility for simultaneously determining guilt and punishment—was so weighty that its presence overwhelmed his ability to make a rational and intelligent choice.

In any event, it is made abundantly clear by the Court's most recent discussion of the privilege against

self-incrimination that, even to the extent the statutory procedure did require petitioner to make a difficult choice, the procedure cannot be condemned. In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court rejected the argument that Florida's notice-of-alibi statute transgressed the privilege against self-incrimination, holding that the privilege no more entitled a defendant to await the end of the State's case before announcing his defense "than it entitled him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself" (399 U.S. at 85). In reaching that conclusion, the Court noted (399 U.S. at 83–85):

> The defendant in a criminal trial is frequently forced to testify himself * * * in an effort to reduce the risk of conviction. * * * That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice * * * even though the attempted defense ends in a catastrophe for the defendant. * * *
>
> * * * Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

Even more clear then is the conclusion in the present case that the privilege against self-incrimination does not entitle the accused "to await the jury's verdict on the State's case-in-chief" *and* on his insanity defense "before deciding whether to take the

stand himself" on the punishment question. Therefore, a procedure which occasions the need to make and act upon the waiver decision before the jury returns its guilt verdict does not unreasonably impinge upon the privilege.

As the Court of Appeals for the Tenth Circuit in *Segura* v. *Patterson*, 402 F. 2d 249, 253 (1968), explained in rejecting an argument identical to petitioner's:

> This compulsion does not derive from any coercion of the State, instead it arises from the desire of the accused to act in his own enlightened self-interest. He is compelled to testify only in the sense that it may be to his advantage to do so. The choice is his embracing no more substantial "chilling effects" in a single-verdict situation than it does in any other instance. It is always the case that in exercising the constitutional right to remain silent, the individual is forced to forego his opportunity to personally appeal to the jury. Whether such an appeal relates to the determination of guilt or punishment or both, it cannot be denied that the inducement not to remain silent and thus to forego a specific constitutional right does not arise from any unnecessary burden imposed by the State. We conclude that the single-verdict procedure does not "needlessly chill the exercise of basic constitutional rights". [Footnote omitted]

A fortiori, petitioner cannot complain that trial pressures encourage waiver of the privilege when these pressures did *not* result in a decision to give up the privilege by testifying at his trial.

C. A STATUTE WHICH AUTHORIZES THE JURY IN A CAPITAL CASE TO FIX PUNISHMENT IN LIGHT OF THE EVIDENCE ADDUCED AT A ONE-STAGE TRIAL ON GUILT IS FUNDAMENTALLY FAIR

The *amici curiae* supporting petitioner's attack on the unitary trial advance the additional argument that the demand for fundamental fairness implicit in the Due Process Clause requires a separate penalty hearing. Their claim is that it is basically irrational to allow a jury to sentence a defendant when there has been no exploration of the personal background factors that are normally considered in judge-sentencing of major felony offenders: "it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue." [36]

Counsel for the United States tends to agree that modern sentencing philosophy properly emphasizes maximum inquiry into the defendant's background, character, and potential and that a separate proceeding directed solely to the penalty question would be an appropriate device for developing such information in a structured way.[37] We disagree, however, with the contention that the Constitution mandates resort to such a device.

Sentencing hearings, and even pre-sentence reports, have not heretofore achieved the level of constitutional requisites when sentence is to be determined by a

[36] Brief *Amici Curiae* of the NAACP et al., Nos. 203 and 204 Appendix, p. 70.

[37] See National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 3604 (1970), App. G, *infra*, p. 147.

judge, and we discern no principled basis, in law or in experience, for a contrary rule applicable to jury sentencing in capital cases. In this final portion of our brief we shall discuss three points that seem to support this conclusion: first, that a State may permissibly determine that a sentence for murder should be set in light of the evidence adduced in the course of litigating guilt; second, that whether or not the State also allows evidence directed toward penalty to come out at the guilt trial, the evidence showing the circumstances surrounding a murder normally provides a sufficiently substantial basis for rational sentencing of the offender; and third, that certain indications that a penalty trial may have a substantive impact in increasing the likelihood of a death sentence caution against general resort to the device as a constitutional requirement.

1. A State may rationally determine that a sentence for murder should be based on the circumstances of the crime itself

Implicit in the argument that the Constitution requires consideration of extrinsic data about the defendant before he can be sentenced is the premise that the State is forbidden to let the punishment "fit the crime" itself. Although current penology *generally* tends toward the view that it is preferable to examine the defendant's life history, we are not aware of any decision by this Court that the Fourteenth Amendment establishes this philosophy as an essential ingredient of due process. At most, the Court has commented that "a state *may* adopt the 'prevalent modern philosophy that the punishment should fit the offender and not merely the crime'." *North Carolina* v. *Pearce,* 395 U.S. 711, 723 (1969) (emphasis

added), quoting from *Williams* v. *New York,* 337 U.S. 241, 247 (1949). But it is inherent in the nature of our federal system that an individual State may elect as a matter of legislative policy not to copy a particular penological philosophy elsewhere in vogue, and we see no fundamental irrationality in a State's decision to adhere to the traditional policy "that the punishment for first degree murder shall fit the particular crime rather than the individual criminal." *Sims* v. *Eyman,* 405 F. 2d 439, 443 (C.A. 9, 1969). Even where that policy is maintained, as we have seen in Point I of this brief, every State that authorizes capital punishment for murder has superimposed a procedure for allowing the jury to individuate the punishment. Thus, even if the penalty decision is made solely in the context of the evidence of the crime, there is room to exercise "a sound discretion" to take into account "consideration of all the circumstances of the crime" in order to decide what the proper penalty should be for the particular murder committed by the defendant on trial. See *Williams* v. *Oklahoma,* 358 U.S. 576, 585 (1959). We see nothing arbitrary in allowing a sentence to be determined in such a context.

Indeed, to the extent this Court has undertaken to deal with the constitutional parameters of lawful punishments, the dominant concern has been with the proportionality of the punishment to the *offense,* and not to the offender. Thus, in *Weems* v. *United States,* 217 U.S. 349 (1910), the Court condemned a particularly intense and persistent combination of punishments for an offense that was found to be relatively

trivial. In our society, as throughout the civilized world, murder is regarded as intrinsically the most hateful of offenses and thus, to the extent a State retains the death penalty, that sanction is generally authorized for murder.[28] Especially where this unique offense is involved, it appears well within the boundaries of substantive due process of law for the State to determine that the punishment for murder should be adjusted only to the facts surrounding that act itself—the ultimate renunciation of social peace and personal security—and need not be measured against the murderer's past deeds or misdeeds.[29]

This Court has historically refused to treat the Constitution as imposing upon the States any particular theory of the nature and purposes of punishment. See, *e.g.*, *Powell* v. *Texas*, 392 U.S. 514, 530 (plurality opinion of Marshall, J.). This recognition of the breadth of the legislative freedom committed to the States in fashioning their criminal laws leaves ample room for a State to determine that the object and effect of its murder statute should be to hold a murderer personally accountable with his life for commit-

[28] See *Frank* v. *United States*, 395 U.S. 147, 148 (1969), explaining that the "most relevant indication" of the "seriousness with which society regards the offense" is the "severity of the penalty authorized for its commission."

[29] Compare Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1077–1078 (1964):

"It is true * * * that the idea of imposing a penalty on a class of offenses rather than adjusting it to the individual punished runs counter to some cherished principles of modern penology. Nevertheless, individualization of punishment appears hardly to be a constitutional principle."

ting that offense, irrespective of his prior life-style."[30] Thus, we believe, even a procedure which utterly precludes introduction of aggravation or mitigation evidence at the trial of an accused's guilt as a murderer provides a constitutionally adequate basis for the jury to determine how he should be punished."[31]

2. Even at a murder trial confined solely to guilt, sufficient facts about the defendant emerge to permit intelligent sentencing

The sentencing milieu we discussed in the preceding section relates to the constitutionality of an abstract model that assumes a *more limited* acquaintance with the defendant's general history than a jury deciding a murder case actually gains. Whether or not the State formally allows evidence purely concerned with punishment to be admitted at a one-stage murder trial, the jury will learn quite a bit about the accused beyond his narrow involvement in the particular crime. To the extent the *amici* supporting petitioner argue that a jury fixing sentence after a unitary trial has only a fragmentary or distorted picture of the real person on trial, the argument suffers from a serious incongruity with reality. The experience of those who try capital murder cases and those who are regularly called upon to review them is that, through one medium of admissibility or another, the jury ordinarily has access to a fairly accurate, albeit often rough or low-relief portrait of the accused's life.

When he was testifying before the British Royal

[30] See Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 407–411 (1958).

[31] Accord, *Sims* v. *Eyman*, *supra*, 405 F. 2d at 443.

Commission on Capital Punishment, Mr. Justice Frankfurter was asked whether juries in capital cases have enough information about the defendant to perform their sentencing responsibility intelligently. He stated that it was his experience that there is a sufficient factual context for the sentence, since "with reference to the particular transaction on which the jury has to pass, a good many facts incidentally come out, either through the defendant when he takes the stand, or through other witnesses, when he doesn't." [32]

The Court of Appeals for the Ninth Circuit in *Sims* v. *Eyman, supra,* recently expressed the same experience in rejecting an argument that introduction of evidence related solely to mitigation is essential to a fair trial (405 F. 2d at 443, 444):

> Many items of information about the defendant may come in during the disclosure of the crime itself and the circumstances surrounding it * * *.
>
> * * * * * * *
>
> * * * When a first degree murder case is tried before a jury, the jury can form an opinion as to the proper punishment from hearing the whole case, observing witnesses, and discussing the evidence introduced concerning the crime and the surrounding circumstances.

Moreover, the general American rule in capital cases is that mitigation evidence is admissible at the guilt stage to show such things as environment, motive, provocation, mental impairment, and the like.[33] Espe-

[32] Frankfurter, Of Law and Men 87 (Elman ed. 1956).

[33] See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1116 (1953).

cially where the defense of insanity is raised, as it was in the present case, the jury is likely to know as much about the accused—at least as much of an extenuating import—as does a judge possessed of a pre-sentence report. In affirming a conviction and death sentence imposed by a jury, the Eighth Circuit, speaking through then Circuit Judge Blackmun, rejected an argument similar to the one made by *amici* here, explaining:

> The jury also had the full picture of the defendant's background, his prior behavior, and the like. And the defense of insanity, with all its implications, is in itself wholly mitigative and rehabilitative in nature. The jury therefore was not without an appropriate measure of information.[34]

In the present case, petitioner was able to bring before the jury through the sympathetic testimony of his mother a rather complete chronology of his life, including his stepfather's jealous rejection of him which drove him from his mother's home at age 14 (C.A. 49), petitioner's head injury at age nine (C.A. 53–54), his employment as a valet for an entertainer (C.A. 53), and his unhappy experiences with marriage even after the birth of a son some nine years prior to the trial (C.A. 54–56). And, of course, the data that were contained in the various psychiatric reports and underlying documents introduced in support of petitioner's insanity defense presented to the jury a more vivid profile of petitioner than the ordi-

[34] *Pope* v. *United States*, 372 F. 2d 710, 730 (1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968).

nary pre-sentence report provides. Thus, whatever quantum of information about the accused may be argued to be constitutionally necessary, there is no room in the facts of the present case to contend that the jury which sentenced petitioner to death lacked that irreducibly minimal familiarity with the man whose fate they decided.

But to bring the discussion full circle we emphasize that the instant case is more typical than anomalous in this regard. Although the contours of the background evidence admitted in first-degree murder cases fluctuate from case to case and jurisdiction to jurisdiction, the normal course of a one-stage murder trial develops enough tangential information about the accused to offer the sentencing jury a rather accurate perspective on him.

3. A separate hearing confined to penalty may affirmatively disadvantage defendants

The practical experience discussed in the preceding section implies a possibility that some courts and commentators have verbalized: that holding a *separate* penalty hearing may in its normal course operate to the disadvantage of defendants, for it offers them little opportunity to adduce mitigating evidence that could not be brought forth at the traditional one-stage guilt trial, but allows the prosecution to develop aggravating factors that would otherwise be inadmis-

sible. This Court[35] and others[36] have in the recent past pointed to this uncertainty about the actual impact of bifurcation as a prudent basis for declining to hold that the Constitution impels its adoption. Our experience with two-stage trials on guilt and punishment stretches back only thirteen years to California's adoption of the device in 1957. It would be improvident, we believe, to freeze this ambivalent procedure, with its merits and demerits still elusive, into a constitutional directive.

In perhaps every single-stage jurisdiction the accused can introduce a good deal of ameliorative information either as somehow bearing upon the guilt determination or as frankly tending toward moderating punishment.[37] In fact in discussing the evidentiary

[35] See *United States* v. *Jackson*, *supra* 390 U.S. at 579–581 and nn. 17 & 19; *Spencer* v. *Texas*, *supra*, 385 U.S. at 567–568 n. 12.

[36] See, *e.g.*, *Frady* v. *United States*, 348 F. 2d 84, 115 (C.A.D.C.) (opinion of Burger, J.) certiorari denied, 382 U.S. 909 (1965); *United States* v. *Curry*, 358 F. 2d 904, 914–915 (C.A. 2), certiorari denied, 385 U.S. 873 (1966); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181, 195 (1968), pending on pet. for cert., No. 5011, O.T. 1970.

[37] See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1116 (1953). See, also *United States* v. *White*, 225 F. Supp. 514, 523 (D.D.C. 1963), rejecting the argument that, under the 1962 amendment to the District of Columbia murder statute giving sentencing discretion to the jury, the jury's initial deliberations should be confined to guilt, with the defendant thereafter permitted to present evidence in mitigation:

"Defendant clearly can only be helped by being permitted to introduce character testimony possibly relevant to the choice of sentences before the jury has agreed upon the [guilt] verdict itself. It is fairest to the defendant for the jury to have the full range of clearly distinguished alternatives before it for consideration at one time."

thrust of the separate penalty hearing proposed by the Model Penal Code (see App. G, *infra*) the Code's Chief Reporter, Prof. Herbert Wechsler, explained to the American Law Institute:

> On the aggravating side the most important illustration would be the previous [criminal] record. On the mitigating side, it may be less likely that there will be mitigations to be established that won't be in evidence, but I can conceive for example of a psychiatric report that might have weight and that would not come in until after the verdict.[38]

It is precisely this type of realistic prediction that courts and commentators have made in suggesting that bifurcation is a "two-way street" which perhaps provides down-hill momentum for the prosecution.[39] Contrasted with the speculation that there *might* be significant mitigating factors that the defense could only introduce at a separate hearing is the unique and certain opportunity for the State to open up the accused's background, character, and criminal history to show just what kind of a person he really is. In the unitary trial, if the defendant's background is unblemished, he can usually demonstrate that. If he is tainted with prior misbehavior he can normally concentrate subtly enough on some redeeming features so that the door will not be opened too wide to expose all his faults.[40] But at a two-stage trial there is little more that the defendant can elucidate, while the State,

[38] 36 A.L.I., Proceedings 193 (1959).

[39] See, *e.g.*, *Sims* v. *Eyman*, 405 F. 2d 439, 444 (C.A. 9, 1969); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181, 195 (1968).

[40] See *Spencer* v. *Texas*, *supra*, 385 U.S. at 560–562.

by hypothesis, is permitted to demonstrate in detail what it otherwise might not be able to show: that the jury need have no illusions about the possibility that the crime on trial might have been a momentary aberration in an otherwise decent life."[41]

The Stanford Law Review's recent massive survey of California murder cases has demonstrated that the feature in the two-stage murder trials that had "the greatest impact on penalty was the presence or absence of a prior criminal record. Defendants with such a record were considerably more likely to receive the death penalty on the basis of that attribute alone."[42] Yet it is just that type of evidence that is generally inadmissible to affect the punishment decision at a unitary trial but is routinely admissible at a penalty hearing.[43] Little wonder then that some commentators have noted that the penalty hearing is by no means an unambiguous plus for defendants.[44]

[41] It has also been suggested that, to the extent there has already been a full hearing focusing on circumstances of aggravation and mitigation, the Executive may be particularly reluctant to grant clemency in the face of the jury's decision. See *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 166–167 (1964).

That same study states that the California experience has been that defense counsel have not been as well prepared for litigation at the penalty phase as have been the prosecuting attorneys, nor have they been as sophisticated. See 39 N.Y.U.L. Rev. at 167. This Court in *United States* v. *Jackson*, *supra*, 390 U.S. at 580 n. 19, attributed this reported phenomenon to the "relative novelty of penalty proceedings".

[42] *A Study of the California Penalty Jury in First-Degree Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1302, 1326 (1969); see, also, *id.* at 1389–1390, 1412.

[43] See Note, 110 U. Pa. L. Rev. 1036, 1037 (1962).

[44] See, *e.g.*, *The Bifurcated Trial Procedure and First Degree Murder*, 3 Suffolk U. L. Rev. 628, 632 (1969).

An examination of bifurcation statutes now in force reveals the scope of adverse evidence admissible under them, frequently without regard to the rules of evidence applicable at a guilt trial.[45] The California statute, for example (Cal. Penal Code § 190.1, App. A, *infra*, p. 126) authorizes the introduction of evidence "of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." Under this statute the State may prove not only prior criminal convictions but also crimes for which the defendant was neither charged nor convicted, so long as the jury is told not to consider them unless established beyond a reasonable doubt. *People* v. *Floyd*, 1 Cal. 3d 694, 83 Cal. Rptr. 608, 464 P. 2d 64, 77 (1970).

The Pennsylvania statute (18 Pa. Stat. § 4701) simply provides that after the verdict of guilt "and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received as may be relevant and admissible upon the question of the penalty to be imposed * * *." Under this statute, the Pennsylvania Supreme Court has upheld the admissibility of evidence of crimes, including a separate homicide, committed by the defendant *after* he committed the murder on trial, reasoning that the statute is designed to let the jury know exactly what kind of man the accused is at the time it fixes his punishment. *Com-*

[45] See, generally, on the admissibility of evidence at penalty hearings: *The California Penalty Trial*, 52 Calif. L. Rev. 386, 388–389 (1964); *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. Rev. 50, 59–63 (1964).

monwealth v. *Bell*, 417 Pa. 291, 208 A. 2d 465, 468 (1965).

The new Connecticut Penal Code continues that State's use of a penalty proceeding. Section 46(a) of the new Code provides in part that in the penalty proceedings:

> * * * evidence may be presented as to any matter that the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any such evidence which the court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence.

The Texas provision states that in the post-verdict proceedings "evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character." Tex. Code Crim. Pro. art. 37.07(3)(a) (Supp. 1970).

New York's statute generally prescribes with reference to the separate punishment hearing (N.Y. Penal Law § 125.35):

> 3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall

> be received regardless of its admissibility under the exclusionary rules of evidence.

The new Georgia statute (Ga. Laws 1970, No. 1333, p. 949) provides that there is to be a penalty hearing after a verdict of guilty is returned in *every* felony case:

> In such hearing, subject to the laws of evidence, the jury shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nole contendre [sic] of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible.

There is substantial reason to believe that these procedures do enlarge the probability that a jury will return a death verdict. In commenting specifically on the bifurcated procedures established in New York and California which "permit the jury access to the broadest possible evidence about the defendant", Professors Kalven and Zeisel reported: "Some judges have suggested that the system may be resulting in an increase in capital cases".[46]

---

[46] The American Jury, *supra*, at 448 & n. 29.

The State of California in its Brief in the *McGautha* case (No. 203) presents statistics in Table C (p. 72) that may indicate that the introduction of bifurcation in California in 1957 has had no discernible effect on the ratio of death sentences to first degree murder convictions. It is difficult, however, to draw any firm conclusions on this question from the gross figures available. The relative constancy of the death penalty

Reported cases tend to show that this adverse substantive impact on defendants—though not an "irrational" or unconstitutional one, of course—may indeed result from focusing on the question of what penalty the convicted murderer deserves.[11] In *Ward* v. *California*, 269 F. 2d 906, 907–908 (C.A. 9, 1959), for example, the court of appeals was faced with a complaint from a murderer sentenced to death after a California penalty trial that at the hearing the jury was given evidence of his prior criminal record which would not have been admissible under the unitary procedure in force at the time the offense was committed. The court held that this material was properly related to rational sentencing under the new procedure and that he could not object to this expansion of the scope of information available to aid in sentencing.

More vivid perhaps is *People* v. *Dusablon*, 16 N.Y. 2d 9, 261 N.Y.S. 2d 38, 209 N.E. 2d 90 (1965), where the New York Court of Appeals was called upon to review death sentences imposed by a jury after a penalty hearing under New York's 1963 bifurcation statute. The two defendants were convicted of felony-

---

ratio over a period when the popular attitude toward the death penalty has probably become somewhat more cautious may mask some net impetus toward the death penalty stemming from fuller knowledge about the defendants' backgrounds.

[11] In *Williams* v. *New York*, *supra*, it will be recalled, the constitutional claims about the nature and source of sentencing information arose after a New York jury at a one-stage trial had made a non-binding recommendation of mercy but the trial judge, with access to background information that had not come before the jury, decided that a death sentence was appropriate. See 337 U.S. at 244.

murder. Under the general American rule to which New York had adhered, evidence of prior criminal convictions was not admissible under the former one-stage procedure, but such evidence was properly admitted at the penalty hearing. In affirming the convictions and death sentences, the court took note of the defendants' plight under the bifurcated system (16 N.Y. 2d at 17, 261 N.Y.S. 2d at 40, 209 N.E. 2d at 91):

> It is possible that, if the jury had not known of appellants' prior criminal records, they might have recommended life imprisonment in the case of either or both of them, particularly, perhaps, in the case of the one who did not fire the fatal shot in this felony murder.[48]

Similarly, defendants who received death sentences after Texas punishment hearings at which relevant bad-character evidence was admissible have unsuccessfully complained about having their full backgrounds exposed to the sentencing jury. See, *e.g.*, *Smith* v. *State*, 437 S.W. 2d 835, 838 (Tex. Crim. App. 1969);

[48] The result in the *McGautha* case (No. 203) now before the Court, tends to substantiate this realistic assessment. There, at the end of the guilt trial the jury had very little clear information about which defendant had fired the fatal shot and knew nothing of their respective criminal records. The jury evidently agonized over the death penalty decision and it seems within the bounds of reasonable surmise to suspect that if there had not been a separate penalty proceeding at which these two questions were fully ventilated the jury might not have felt confident enough about the identity of the trigger-man or about the defendants' characters to sentence either of them to death.

Jones v. *State*, 416 S.W. 2d 412, 414 (Tex. Crim. App. 1967)."

And the Supreme Court of the State of Washington, in affirming a death penalty set by a jury after a one-stage trial for murder, overruled an objection to the denial of a request for bifurcation, noting pointedly, *State* v. *Smith*, 74 Wash. 2d 744, 446 P. 2d 571, 591 (1969):

> It may be true that the advantages of a bifurcated trial outweigh the disadvantages to the defendants; but the defendants themselves do not appear to be altogether certain of this, particularly the [co-]defendant Riggins, who objected to the procedure when it was proposed to the trial court."

" See, also, *People* v. *Hurst*, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969); *People* v. *Kelley*, 44 Ill. 2d 315, 255 N.E. 2d 390 (1970), upholding the introduction of bad-character evidence in separate penalty hearings in capital cases under the Illinois provision for the sentencing judge in all felony cases to hear post-conviction evidence in aggravation and mitigation. See Ill. Ann. Stat. ch. 38, § 1–7(g) (Smith Hurd, Supp. 1970).

" See, also, the opinion of the Chief Justice while a circuit judge, in *Frady* v. *United States*, *supra*, 348 F. 2d at 115, advancing similar reasons for cautioning against judicial establishment of mandatory bifurcation:

"Various arguments against such a system appear in the proceedings of the Judicial Conference of this Circuit which considered this problem in drafting the bill it sent to Congress: *e.g.*, that such a procedure would be troublesome, expensive and time-consuming; that the introduction of aggravating background evidence would work too harshly against the defendant, inflaming the jury rather than providing a basis for dispassionate exercise of discretion. A further substantial argument

With the record this ambivalent on the crucial question of what effect separate penalty trials may have on the defendants who are exposed to them, there is a need for prudent restraint in deciding that the Constitution requires their adoption as an integral feature of due process. To some extent, a separate hearing on punishment probably does introduce greater "rationality" into the jury sentencing system, in that the jury is more likely to learn just how jaded a particular defendant may be. But on the other hand, it appears that this procedure does not ordinarily acquaint the jury with substantially more extenuating circumstances than they otherwise would observe or learn about. There exists at present this disquieting uncertainty about whether a separate penalty trial may not in fact tip the scales in favor of a capital sentence. Certainly our experience with bifurcated capital trials over the past thirteen years is empty of any genuine or compelling indication that such procedures are *more* fair to an accused than the traditional unitary trial. It seems to us, therefore, that the Court should not be encouraged to believe that bifurcation is so over-

---

made against a two-trial system during the course of our 1959 Judicial Conference proceedings was that defendants are probably better off under the present system, since in many capital cases the 'insanity' issue is raised and the accused reaps much of the benefit of developing background information in mitigation without the burden of being exposed to evidence in aggravation. Some serious students of this problem see an additional point in that defense counsel may be slow to adapt their tactics to a two-trial procedure, thus prejudicing their clients." (footnote omitted)

whelmingly indispensable to a fair trial and a just sentence that due process of law forbids any other procedure.

CONCLUSION

In the view of the United States, therefore, there is no constitutional reason why the judgments of the Supreme Court of California in No. 203, *McGautha* v. *California*, and of the Supreme Court of Ohio in No. 204, *Crampton* v. *Ohio*, should not be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
PHILIP A. LACOVARA,
Special Assistant to the Attorney General.

OCTOBER 1970.

405-388—70——10

APPENDIX A

Statutes Involved

I. Sections 190 and 190.1 of the California Penal Code (West, Supp. 1970) provide:

§ 190. Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

§ 190.1. The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of

proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

II. Section 2901.01 of the Ohio Revised Code Ann. (Page, 1954), provides:

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate a rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life. Murder in the first degree is a capital crime under Section 9 and 10 of Article I, Ohio Constitution.

APPENDIX B

INITIAL INTRODUCTION OF JURY DISCRETION TO SET LIFE SENTENCE FOR MURDER AND/OR OTHER CAPITAL OFFENSES[1] (NONE PROVIDING STATUTORY STANDARDS)

1838—Tennessee, Act of June 10, 1838, Laws 1837-1838, ch. 29.

1841—Alabama, Penal Code of 1841 (Act of Jan. 9 1841), ch. 3, § 1, Acts 1841, p. 122.

1846—Louisiana, Act of June 1, 1846, Acts 1846, No. 139, p. 118 (all capital crimes)

1858—Texas, Act of February 12, 1858, Gen. Laws 1858, ch. 121, art. 71a (in any capital case, when lesser penalty authorized, jury to fix penalty)

1861—Georgia, Code 1861, § 4220

1866—Georgia, Acts 1866, No. 208 (all capital crimes)
Georgia, Acts 1866, No. 210 (rape)

1867—Illinois, Public Laws 1867, p. 90, § 1 (all capital felonies; life or term not less than 14 years optional)

1868—Minnesota, General Laws 1868, ch. 88

1869—Kentucky, Public Acts 1869, ch. 1659, § 1 p. 52 (rape; jury to sentence to death or term of years)

1870—West Virginia, Code 1870, ch. 159, § 19

---

[1] Unless otherwise indicated, all provisions relate to murder. Four states that abolished capital punishment for murder in the middle of the last century are the only states that have not enacted statutes of this type authorizing jury discretion (Rhode Island, Maine, Michigan, and Wisconsin).

1872—Florida, Acts 1872, No. 15, ch. 1877 (any capital offense)

Mississippi, Laws 1872, ch. 76, § 5 (in any capital case, life sentence with "consent" of jury)

1873—Kentucky, Gen. Stat. 1873, ch. 29, art. 3, § 3, p. 322

1874—California, Act of March 28, 1874, Amendatory Acts 1873–1874, ch. 508, p. 457

1876—Utah Territory, Penal Code of 1876, § 90, Comp. Laws 1876, p. 586

1878—Iowa, Laws 1878, ch. 165 [on re-establishment of capital punishment]

South Carolina, Acts 1878, No. 541 (arson and rape)

1881—Indiana, Revised Statutes 1881, § 1904

1883—Dakota Territory, Laws 1883, ch. 9, §§ 1, 2

1885—Arizona Territory, Acts 1885, No. 70, p. 134 (life, unless jury fixes death)

1890—Oklahoma Territory, Statutes 1890, ch. 25, § 13, p. 446 [enacted by first territorial legislature]

1893—Nebraska, Laws 1893, ch. 44

1894—South Carolina, Acts 1894, No. 530, p. 785

1897—United States, Act of January 15, 1897, c. 29, § 1, 29 Stat. 487 (murder and rape; jury authorized to prescribe "without capital punishment")

1898—Ohio, 93 Ohio Laws 223

1899—Alaska, Criminal Code, Act of March 3, 1899, c. 429, §§ 3, 4, 30 Stat. 1253 (murder punishable by death unless jury qualifies verdict by adding "without capital punishment")

1901—Colorado, Laws 1901, ch. 64, § 2 [on re-establishment of capital punishment]

1903—New Hampshire, Laws 1903, ch. 114, § 1

1907—Missouri, Laws 1907, p. 235
Montana, Laws 1907, ch. 179, § 1
1910—Vermont, Acts 1910, No. 225
1911—Idaho, General Laws 1911, ch. 68, § 1, p. 190
Nevada, Act of March 11, 1911, § 121, Revised Laws 1912, § 6386
1914—Virginia, Acts 1914, ch. 240, p. 419
1915—Arkansas, Acts 1915, No. 187, § 1 (all capital cases)
Wyoming, Session Laws 1915, ch. 87, § 1
1916—Maryland, Laws 1916, ch. 214, § 1 (murder punishable by death or life in discretion of court unless jury adds binding qualification "without capital punishment")
New Jersey, Pub. Laws 1916, ch. 270, § 1, p. 576.
1917—Delaware, Laws 1917, ch. 266 (all capital cases; jury authorized to make non-binding recommendation of life)
1919—Washington, Session Laws 1919, ch. 112, § 1, p. 273 [on re-establishment of capital punishment] [under Session Laws 1909, ch. 249, § 140, prior to abolition, discretion had been given to court]
1920—Oregon, Gen. Laws 1920, ch. 19 (death, unless jury fixes life) [on re-establishment of capital punishment]
1925—Pennsylvania, Public Laws 1925, ch. 411, § 1, p. 759
1935—Kansas, Laws 1935, ch. 154 [on re-establishment of capital punishment]
1937—New York, Laws 1937, ch. 67, §§ 1, 2 (death, unless jury fixes life)
1939—New Mexico, Laws 1939, ch. 49 (death, unless jury specifies life)
1949—North Carolina, Session Laws 1949, ch. 299 (all capital cases)

1951—Connecticut, Public Acts 1951, No. 369
Massachusetts, Acts 1951, ch. 203 (death, unless jury fixes life; death mandatory for murder in course of rape)
1955—Hawaii, Laws 1955, Act 239, § 4
1962—District of Columbia, Act of March 22, 1962, Pub. L. 87–423, § 1, 76 Stat. 46.

APPENDIX C

States Authorizing Jury To Exercise Discretion in Unitary Trial To Set Sentence for Murder at Death or Life Imprisonment (None Providing Statutory Standards)[1]

Ala. Code tit. 14, § 318 (1958)

Ariz. Rev. Stat. Ann. § 13–453 (1956)

Ark. Stat. §§ 41–2227 (death penalty specified for murder), 43–2153 (jury has right to render life verdict in any capital case) (1964)

Colo. Rev. Stat. § 40–2–3 (1963)

Del. Code Ann. tit. 11, §§ 571 (death penalty specified for murder), 3901 (in all capital cases jury may make nonbinding recommendations of life) (Supp. 1968)

---

[1] Except as otherwise noted, statutes do not provide that one penalty or the other will be imposed in the absence of a contrary determination by the jury.

Two states permitting capital punishment for murder do not leave the penalty question with the jury. In North Dakota only first degree murder committed while serving a life sentence for murder may be punished by death, but the judge determines whether to impose the death sentence. See N.D. Cent. Code §§ 12–27–13 (1960), 12–06–06 (Supp. 1969). In Rhode Island, murder is punishable by life imprisonment unless committed by a person under a life sentence, in which case the death penalty is directed. See R.I. Gen. Laws § 11–23–2 (1969).

In nine states there is no death penalty for murder, the maximum punishment being life imprisonment. See Alaska Stat. §§ 11.15.010, 11.15.020 (Supp. 1968); Hawaii Rev. Stat. § 748–4 (1968); Iowa Code Ann. § 690.2 (Supp. 1969); Me. Rev. Stat. Ann. tit. 17, § 2651 (1964); Mich. Comp. Laws § 750.316 (Supp. 1970); Minn. Stat. Ann. § 609.185 (1964); Ore. Rev. Stat. § 163.010 (1967); W. Va. Code § 61–2–2 (1966); Wis. Stat. Ann. § 940.01 (1958).

D.C. Code Ann. § 22–2404 (1967) (death unless jury recommends life)

Fla. Stat. Ann. §§ 782.04 (1965) (death penalty specified for murder), 919.23(2) (1944) (in all capital cases jury may sentence to life)

Idaho Code § 18–4004 (1948)

Illinois Ann. Stat. ch. 38, §§ 9–1 (Smith-Hurd, 1964) (indeterminate term of fourteen years to life, or death for murder), 1–7(c)(1) (Smith-Hurd, Supp. 1970) (imprisonment unless jury returns non-binding verdict of death) [Illinois Criminal Code of 1961, Laws 1961 p. 1983]

Ind. Ann. Stat. §§ 10–3401 (life or death for murder), 9–1819 (jury fixes punishment)

Kan. Stat. Ann. §§ 21–3401 (murder is Class A felony punishable by death or life), 21–4501 (jury determines which punishment to be inflicted for Class A felonies) (Supp. 1969) [as added by Kansas Criminal Code of 1969, Laws 1969, ch. 80, effective July 1, 1970]

Ky. Rev. Stat. § 435.010 (1969) (murder punishable by death or life) (1969); Ky. R. Crim. P. § 9.84 (1969) (jury fixes punishment)

La. Stat. Ann. § 14.30 (1951) (death penalty specified for murder); La. Code Crim. P. Ann. art. 817 (West 1967) (jury may qualify verdict in any capital case as "without capital punishment")

Md. Ann. Code art. 27, § 413 (1967) (death or life, to be determined by court, unless jury specifies "without capital punishment")

Mass. Ann. Laws, ch. 265, § 2 (1968) (death, unless jury fixes life)

Miss. Code Ann. §§ 2217 (death penalty specified for murder), 2536 (in any capital case, jury may reduce penalty to life) (1956)

Mo. Ann. Stat. §§ 559.030 (1959) (death or life for murder) 546.410 (1953) (jury selects punishment in any case where alternatives available)

Mont. Rev. Codes § 94–2505 (1969)

Neb. Rev. Stat. § 28–401 (as amended by Laws 1969, ch. 213, p. 829 [providing for penalty to be determined by court after guilty plea or judge-trial])

Nev. Rev. Stat. § 200.030 (1969)

N.H. Rev. Stat. Ann. § 585:4 (1955) (life, unless jury specifies capital punishment)

N.J. Stat. § 2A:113–4 (1951) (death, unless jury recommends life)

N.M. Stat. Ann. §§ 40A–2–1 (murder is capital felony), 40A–29–2 (capital felon to be sentenced to death unless jury sets life) (1964), 40A–29–2.1 (Supp. 1969) (as added by Laws 1969, ch. 128, § 1, providing there shall be no capital punishment except for killing peace officer or, if jury recommends death, for committing second capital felony after time for "due deliberation" following commission of capital felony)

N.C. Gen. Stat. § 14–17 (1969) (death, unless jury recommends life)

Ohio Rev. Code Ann. § 2901.01 (Page, 1954) (death, unless jury recommends mercy)

Okla. Stat. Ann. tit. 21, § 707 (1958)

S.C. Code § 16–52 (1962) (death, unless jury sets life)

S.D. Comp. Laws §§ 22–16–12 (murder punishable by death or life); 22–16–13 (after return of guilty verdict, court may require jury to deliberate on punishment, with or without instructions; death sentence authorized, but not required, only if jury so recommends); 23–48–16 (whenever court has discretion on punishment it may hear evidence on aggravation or mitigation) (1967)

Tenn. Code Ann. §§ 39–2405, 39–2406 (1956) (death, unless jury finds "mitigating circumstances," then may fix term from 20 years up to life)

Utah Code Ann. § 76–30–4 (1953) (death, unless jury recommends life)

Vt. Stat. Ann. tit. 13, § 2303 (Supp. 1969) (death penalty authorized, in the determination of the jury, only for unrelated second murder or for killing of peace officer)

Va. Code §§ 18.1–22, 19.1–250 (1960) (death, life, or at least 20 years)

Wash. Rev. Code § 9.48.030 (1956) (life, unless jury imposes death)

Wyo. Stat. § 6–54 (1957) (death, unless jury qualifies verdict as "without capital punishment")

APPENDIX D

States Authorizing Jury To Exercise Discretion in Separate, Post-Guilt Proceeding To Set Sentence for Murder at Death or Life Imprisonment (None Providing Statutory Standards)

Calif. Penal Code §§ 190, 190.1 (West, Supp. 1970) [§ 190.1, providing for bifurcation, added by Stat. 1957, ch. 1968, § 2, p. 3509]

Conn. Gen. Stat. § 53–10 (1968) [as amended by Pub. Acts 1963, No. 588, to provide for separate proceeding on penalty] [superseded by § 46 of Connecticut Penal Code, effective October 1, 1971, Pub. Acts 1969, No. 828, also providing for bifurcation, making jury recommendation of death penalty non-binding]

Georgia Code Ann. §§ 26–1101 (death or life for murder), 26–3102 (in all capital cases, death to be imposed only if jury so recommends, otherwise life) (Supp. 1969) [as added by Criminal Code of Georgia, Laws 1968, p. 1249, effective July 1, 1969] [bifurcation now authorized by Act of March 27, 1970, Laws 1970, No. 1333, p. 949: in all felony cases, separate pre-sentence hearing to be conducted before same jury as returned guilty verdict, to determine punishment; jury to fix punishment unless it cannot agree; death sentence may not be imposed unless jury so decides].

N.Y. Penal Law §§ 125.30, 125.35 (1967) [bifurcation first authorized under prior Penal Law by Laws 1963, ch. 994, §§ 1, 2, amending former Sections 1045 and 1045–a]

Pa. Stat. tit. 18, § 4701 (1963) [as amended by Public Laws 1959, No. 594, § 1, p. 1621, to provide for separate proceeding on penalty]

Tex. Penal Code Ann. art. 1257 (1961) (murder punishable by death, or term of at least two years); Tex. Code Crim. P. Ann. art. 37.07 (2)(b) (Supp. 1970) (where state seeks death penalty, punishment to be determined by jury) [bifurcation first authorized under prior provision, Texas Code of Criminal Procedure of 1965, Acts 1965, ch. 722, vol. 2, p. 317: punishment to be determined by judge unless defendant elected jury determination; separate penalty hearing authorized in either event]

APPENDIX E

FEDERAL CIVIL STATUTES AUTHORIZING DISCRETION IN IMPOSING CAPITAL PUNISHMENT (NONE PROVIDING STATUTORY STANDARDS) [1]

I. Statutes Under Which Only the Jury Can Impose Death Sentence: [2]

18 U.S.C. § 837(b) (transporting explosives with intent to injure, if death results)

18 U.S.C. § 1201(a) (kidnapping, if victim not released unharmed)

18 U.S.C. § 2113(e) (bank robbery accompanied by death or kidnapping)

21 U.S.C. § 176b (selling heroin to minor)

42 U.S.C. § 2272 (violating or impeding enforcement of Atomic Energy Act)

42 U.S.C. §§ 2274, 2275, 2276 (communicating, acquiring, or tampering with restricted data with intent to injure United States)

II. Statutes Which Provide For Death Penalty

[1] The death penalty is not mandatory under any federal civil statutes. Since 1930, there have been 33 executions under the civil authority of the federal government: 15 for murder, 6 for kidnapping (in five such cases the victim had been killed), 6 for sabotage, 2 for rape, 2 for espionage, and 2 for bank robbery with homicide. There has been only one federal civil execution since 1957, and that in 1963 for kidnapping. See U.S. Bureau of Prisons, *National Prisoner Statistics Bulletin: Capital Punishment 1930–1968* table 14 (August 1969).

[2] The death penalty provisions in two of the statutes in this category were held unconstitutional in *United States* v. *Jackson*, 390 U.S. 570 (1968) (18 U.S.C. § 1201(a)), and *Pope* v. *United States*, 392 U.S. 651 (1968) (18 U.S.C. § 2113(e)).

Unless Jury Qualifies Its Verdict as "Without Capital Punishment":

18 U.S.C. § 1111 (first degree murder within federal territory)

18 U.S.C. § 1114 (murder of designated federal officials)

18 U.S.C. § 1751 (murder or kidnapping, if death results, of President or others in line of presidential succession)

III. Statutes Which Provide that Jury or Judge Trying Guilt, or Judge After Guilty Plea, May Set Death Penalty:

18 U.S.C. § 34 (destruction of aircraft or motor carrier facilities, resulting in death)

18 U.S.C. § 1716 (causing death by mailing injurious substances)

18 U.S.C. § 1992 (train wrecking resulting in death) [death or life, in discretion of jury or of court in case of guilty plea; no provision with respect to trial by court]

49 U.S.C. § 1472(i) (aircraft piracy)

IV. Statutes Which Leave Capital Sentencing Discretion to the Court in All Situations:

18 U.S.C. § 794 (delivery of defense information to foreign government)

18 U.S.C. § 2031 (rape within federal territory)

18 U.S.C. § 2381 (treason)

APPENDIX F

Offenses Under the Uniform Code of Military Justice Punishable by Death or Such Other Punishment as a Court Martial May Direct[1]

Art. 85, 10 U.S.C. § 885 (desertion in time of war)
Art. 90, 10 U.S.C. § 890 (striking, drawing weapon on, or disobeying lawful order of superior, in time of war)
Art. 94, 10 U.S.C. § 894 (mutiny)
Art. 99, 10 U.S.C. § 899 (misbehavior before the enemy)
Art. 100, 10 U.S.C. § 900 (subordinate's compelling surrender)
Art. 101, 10 U.S.C. § 901 (improper use or disclosure of countersign in time of war)
Art. 102, 10 U.S.C. § 902 (forcing a safeguard)
Art. 104, 10 U.S.C. § 904 (aiding the enemy)
Art. 110, 10 U.S.C. § 910 (wilfully hazarding military vessel)
Art. 113, 10 U.S.C. § 913 (misbehavior by sentinel)
Art. 118; 10 U.S.C. § 918 (murder)
Art. 120, 10 U.S.C. § 920 (rape)

---

[1] The Uniform Code provides a mandatory death sentence only for one crime, spying, Art. 106, 10 U.S.C. § 906.

Since 1930, the Army and the Air Force have carried out 160 executions, none since 1961. Of these, 106 were for murder, and 53 for rape. (As to the present scope of court-martial jurisdiction over such offenses, see *O'Callahan* v. *Parker*, 395 U.S. 258 (1969).) The remaining execution was for desertion.

The Navy has not executed any one since 1849. See U.S. Bureau of Prisons, *National Prisoner Statistics Bulletin: Capital Punishment 1930–1968* at p. 1 n. 2 (August 1969).

APPENDIX G

I. Section 210.6 of the American Law Institute's *Model Penal Code* (Prop. Off. Draft 1962) provides:

"Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence

"(1) *Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

"(2) *Determination by Court or by Court and Jury.* Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should

405-388—70——11

be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

"In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

"The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

"Alternative formulation of Subsection (2):

"(2) *Determination by Court.* Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordane with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair oppor-

tunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

"(3) *Aggravating Circumstances.*

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atro-

cious or cruel, manifesting exceptional depravity.

"(4) *Mitigating Circumstances.*

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime."

II. Chapter 36, "Sentence of Death or Life Imprisonment", of the National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code*[1] (1970), provides in part:

[1] The Study Draft would provide for a death penalty only for treason and for certain categories of intentional murder. See Sections 1601 and 3602.

"§ 3602. When Sentence of Death or Life Imprisonment Authorized

"A sentence of death or of life imprisonment is authorized only for a defendant found guilty of:

(a) treason (section 1101);
(b) first degree murder (section 1601).

[§ 1601. Murder.

(1) Offense. A person is guilty of murder if he:

* * * * *

(2) Grading. Murder is in the first degree, punishable as provided in Chapter 36, if it is: (a) intentional murder of the President, Vice President, President-elect or Vice-President-elect of the United States; (b) intentional murder of a law enforcement officer, or a public servant having custody of the defendant or another, to prevent the performance of his official duties; or (c) intentional murder by a convict, under sentence of imprisonment for murder or under sentence of life imprisonment or death, while in custody or immediate flight therefrom. Otherwise murder is in the second degree, a Class A felony.]

"§ 3603. Death Sentence Excluded

"If a defendant is found guilty of a crime listed in section 3602, the court shall impose a sentence of life imprisonment if it is satisfied that:

(a) the defendant was less than eighteen years old at the time of the commission of the crime;
(b) the defendant's physical or mental condition calls for leniency;
(c) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt; or
(d) there are other substantial mitigating circumstances which render sentence of death unwarranted.

"§ 3604. Further Proceedings To Determine Sentence

(1) Court or Jury. Unless the court imposes sentence under section 3603, it shall conduct a separate proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted before a jury unless the defendant, with the approval of the court, waives it. If a jury determined the defendant's guilt and it is not discharged by the court for good cause, the proceeding shall be conducted with that jury. Otherwise it shall be conducted with a jury empaneled for that purpose.

(2) Evidence and Instructions. In the proceeding, evidence may be presented by either party as to any matter relevant to sentence, including the nature and circumstances of the crime, defendant's character, background, history, mental and physical condition, and any aggravating or mitigating circumstances. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut such evidence.

(3) Verdict and Sentence. The determination whether a sentence of death shall be imposed shall be in the discretion of the court, except that when the proceeding is conducted before the court sitting with a jury, the court shall not impose a sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or life imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the court shall impose a sentence of life imprisonment.

"§ 3605. Criteria for Determination

(1) Consideration of aggravating and mitigating circumstances. In deciding whether a sentence of death should be imposed, the court and the jury, if any, may consider the mitigating and aggravating circumstances set forth in the subsections below. [The death sentence shall not be imposed unless one of the aggravating circumstances be found.]

(2) Mitigating Circumstances. In the cases of both treason and murder the following shall be mitigating circumstances:

(a) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(b) the defendant acted under unusual pressures or influences or under the domination of another person;

(c) at the time of the offense, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(d) the youth of the defendant at the time of the offense;

(e) the defendant was an accomplice in the offense committed by another person and his participation was relatively minor;

(f) the offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

(g) the defendant has no significant history of prior criminal activity.

(3) Aggravating Circumstances (Treason). In the case of treason, the following shall be aggravating circumstances:

(a) the defendant knowingly created a great risk of death to another person or a

great risk of substantial impairment of national security;

(b) the defendant violated a legal duty concerning protection of the national security;

(c) the defendant committed treason for pecuniary gain.

(4) Aggravating Circumstances (Murder). In the case of murder, the following shall be aggravating circumstances:

(a) the defendant was previously convicted of another murder or a felony involving the use or threat of violence to the person;

(b) at the time the murder was committed the defendant also committed another murder;

(c) the defendant knowingly created a great risk of death to many persons;

(d) the murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping;

(e) the murder was committed for pecuniary gain;

(f) the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

U.S. GOVERNMENT PRINTING OFFICE: 1970